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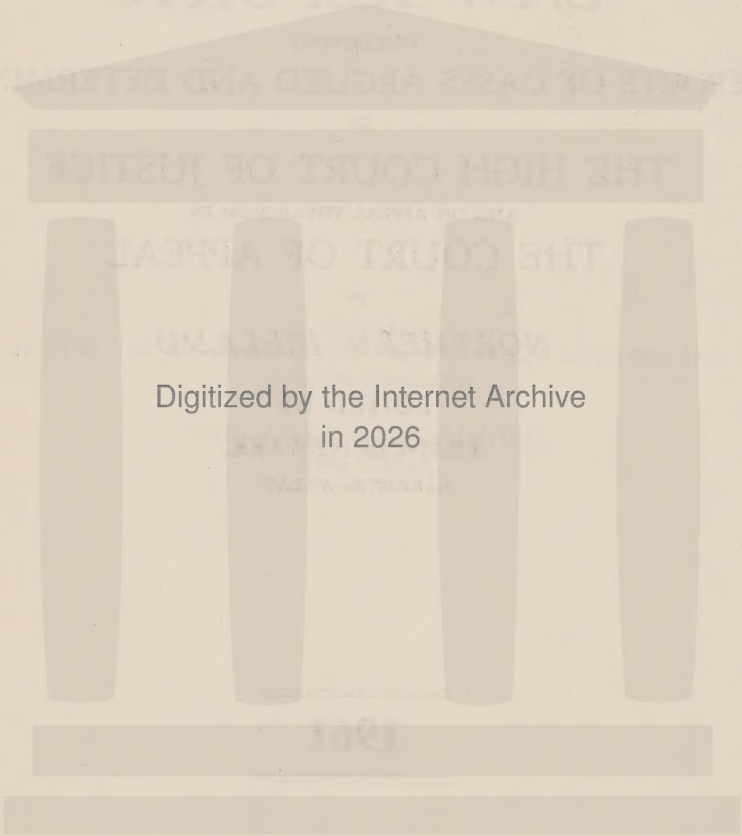

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THE COURT OF APPEAL

IN

NORTHERN IRELAND

FULTON v. KEE[1]

Will—Execution—Requirements for an assisted signature—Whether the sufficiency of an assisted signature depends upon an implied direction—Distinction between an assisted signature and a signature made by another on testator's direction—Whether acknowledgment of a directed signature necessary when direction is given and signature made in presence of witnesses—Wills Act, 1837 (7 *Wm.* 4 & 1 *Vict. c.* 26), *s.* 9.

In a probate suit to establish a will it was alleged (inter alia) that the will had not been executed in accordance with section 9 of the Wills Act, 1837. The medical evidence at the trial showed that the testator was in an advanced condition of disseminated sclerosis which made movement very difficult, if not impossible. The attesting witnesses, a solicitor and a solicitor's clerk, gave evidence of the manner in which the will was executed. One stated that "the will was signed by his mark in our presence", and described how the pen had been placed in the testator's fingers. The other said: "I took the will and "the pen and I backed the pen against his fingers and I made the mark." Neither was cross-examined about the procedure followed when the will was executed, and the judge told the jury in his summing-up that if they accepted the evidence of the attesting witnesses they were entitled to find that the will had been duly executed. The jury were not told that it was for them to decide whether or not the testator had made any physical contribution in the act of signing, nor was the distinction between an assisted signature and a signature by direction explained to them.

On appeal to the Court of Appeal *held* by the whole court, (i) that the sufficiency of an assisted signature by a testator does not rest upon an implied direction; provided that there is some positive physical contribution on the part of the testator which is sufficient to indicate an intention to execute his

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Dec. 14, 15, 16, 17, 1959; Jan. 12, 13, 14, 18, June 30, 1960.

will personally the resulting signature, though assisted, will be his own signature and no direction to sign need be proved;

(ii) that where a will is signed by some person other than the testator and the attesting witnesses are present both when the testator gives his direction to sign and when the signature is made, it is not then necessary for the testator to acknowledge the signature;

(iii) that the mere passive conduct of the testator in connection with the signing of the will, while not amounting to a personal signature, may be sufficient to prove an implied direction to another person to sign on the testator's behalf.

Held, further, by Lord MacDermott L.C.J. and Black L.J., Curran L.J. dissenting on this point, that though there was in the present case some evidence upon which the jury, if properly instructed, could have found in favour of due execution by means of a personal assisted signature, they had been misdirected inasmuch as (a) they had not been informed of nor instructed on the distinction between an assisted signature and a signature by direction, and (b) the judge had over-emphasised the importance of the maxim "omnia rite acta esse praesumuntur"; and that accordingly a new trial should be ordered limited to the issue of due execution.

APPEAL from judgment entered by Sheil J. sitting with a jury in an action in the Queen's Bench Division (Probate) for the probate of the will of Albert Joseph Fulton.

Albert Joseph Fulton died on September 3, 1957, having made two wills within a few weeks of his death. By the first will, dated July 26, 1957, he left all his estate to the defendant and appointed him executor. By the second will, dated August 20, 1957, he purported to revoke all former wills and left his estate in four equal shares to four specified groups of cousins. Under this will the plaintiff, who was appointed executor, was entitled to an eighth share of the estate as a cousin of the testator, but the defendant, as a son of a cousin of the testator, was not entitled to receive anything.

In a probate suit in which the plaintiff sought to propound the will dated August 20 and in which the defendant sought to propound the will dated July 26, the defendant alleged that the second will was not duly executed; that at the date thereof the deceased was not of sound mind, memory and understanding; that he did not know and approve of its contents; and that its execution was obtained by the undue influence of the plaintiff and of another person whose mother was a cousin of the deceased[1].

For about six years before his death the testator had been a patient in the Waterside Hospital, Londonderry, suffering from disseminated, or multiple, sclerosis, a disease of the central nervous

[1] This case is reported solely on the issue of due execution.

system which causes a developing paralysis and as a result of which he had become increasingly helpless. By the summer of 1957 he was in the final stages of this malady, capable of less and less voluntary movement, growing gradually weaker and troubled with bed sores and the toxaemia they produced.

On August 20 the testator was attended in hospital by Mr. Gerard J. McCanny, a solicitor, and by Mr. Samuel Fyffe, a solicitor's clerk. Screens were placed round the bed and when the testator's instructions for his will had been given and noted, the will itself was drawn by Mr. Fyffe. The relevant evidence given by Mr. McCanny and Mr. Fyffe dealing with the manner in which the will was executed is set out in the judgment of the Lord Chief Justice. One witness said that the pen had been put between the testator's fingers, which he described as being "locked", and the other said that it had been backed against his fingers, his hands being clasped in front of him. The medical evidence was that the effect of late disseminated sclerosis is a general stiffening of all muscles rendering movement almost impossible. The testator was described as being "quite helpless".

At the trial the plaintiff succeeded in establishing the second will, the questions regarding it as to execution, capacity, knowledge and approval and undue influence being all answered by the jury in his favour. The questions left to the jury concerning execution, capacity and knowledge and approval as respects the first will were, in the circumstances, left unanswered. The defendant appealed to the Court of Appeal.

Gibson Q.C., *Reid Q.C.* and *Shaw* for the defendant and appellant. On the evidence produced at the trial it is clear from the authorities that what took place did not amount to personal execution of the will of August 20 by the testator. The terms of section 9 of the Wills Act, 1837[1] must be strictly followed: *Brown v. Skirrow*[2].

In order to prove an assisted signature there must be evidence of some voluntary act done by the testator with the intention of executing his will. Signature involves both a physical and a mental element. In order to satisfy the requirement as to the physical act the testator must provide at least some motive power in affixing the

1 Wills Act, 1837, s. 9: "No will shall "be valid unless it shall be in writing, "and executed in manner hereinafter "mentioned; (that is to say,) it shall "be signed at the foot or end thereof "by the testator, or by some other "person in his presence and by his "direction; and such signature shall "be made or acknowledged by the "testator in the presence of two or "more witnesses present at the same "time, and such witnesses shall "attest and shall subscribe the will "in the presence of the testator, but "no form of attestation shall be "necessary."

2 [1902] P. 3, 7.

signature. *Wilson v. Beddard*[1]; *Lewis v. Lewis*[2] exemplify this aspect. The necessity for a testamentary intention continuing throughout the execution and attestation is shown by such decisions as *In re Maddock*[3] and *Burke v. Moore*[4]. Testamentary intention is a question of fact, but in this case that question of fact was removed from the jury when the trial judge told them that whether they accepted Mr. Fyffe's version of what took place or Mr. McCanny's version, there was a presumption of due execution. The jury should have been directed that it was for them to find whether the testator signed the will himself, and if not, then they must be satisfied that there was evidence of a direction to Mr. McCanny to sign on behalf of the testator and of acknowledgment of such signature. In the absence of one or other of these findings there is no due execution: *In re Chalcraft*[5]. In the absence of any evidence of direction to Mr. McCanny to sign on behalf of the testator and acknowledgment of that signature it must be established that the testator intended to sign the will and that he played some physical part in the actual signing: see *Dufaur v. Croft*[6] and *Bell v. Hughes*[7].

The authorities establish that if the intending testator and another person both participate in the signature, it is valid only if the testator voluntarily grips and holds the pen as opposed to being in passive contact with it, and if he provides at least some of the motive power. He must be the *dux facti* and the other may guide or otherwise contribute an ancillary function. Mr. McCanny's evidence was: "I took "the will and the pen and I backed the pen against his fingers and I "made the mark." It was, therefore, the signature of Mr. McCanny and not of the testator. In the absence of evidence of physical participation by the testator the Wills Act requires proof of a direction to sign, either verbal or by some act which leaves no doubt as to the testator's intention, and of subsequent acknowledgment of the signature in the presence of the witnesses.

Section 9 of the 1837 Act makes provision for the case of the incapacitated testator and the sequence of events which must be proved. Some of the authorities appear to be imprecise in that they fail to distinguish between direction and acknowledgment and the necessity for the existence of each—see *In re Marshall*[8]—but it is clear that the requirements of the section must be strictly complied with: *Burke v. Moore*[4]. It is not, however, necessary that either the

1 (1841) 12 Sim. 28.
2 (1861) 2 Sw. & Tr. 153.
3 (1874) L.R. 3 P. & D. 169.
4 (1875) I.R. 9 Eq. 609, 612.
5 [1948] P. 222.
6 (1840) 3 Moore P.C.C. 136.
7 (1880) 5 L.R. Ir. 407.
8 (1866) 13 L.T. 643.

direction or acknowledgment should be formal. They may be implied and they may be given through an agent, provided that there is evidence that the act or word of the agent was authorised and acquiesced in by the testator: *Inglesant v. Inglesant*[1]; *Cooke v. Henry*[2]. An implied direction or acknowledgment can only be inferred from some conduct on the part of the testator. In this case the testator did absolutely nothing and it cannot be said that Mr. McCanny could have been an agent for the purpose of signing or acknowledgment. It is true that an attesting witness may sign for a testator and may witness the testator's acknowledgment—*In re Bailey*[3]; *Smith v. Harris*[4]—but if there be no acknowledgment by the testator or if the witness acknowledge the signature on behalf of the testator, he cannot then witness his own act. In the circumstances, therefore, the attestation is insufficient.

The evidence in this case all tends to show that what took place was not due execution and, that being so, it would be quite wrong to introduce the maxim "omnia praesumuntur rite esse acta". That presumption is dealt with by Lindley L.J. in *Harris v. Knight*[5] and by Palles C.B. in *Clery v. Barry*[6], but the basic principle emerges perhaps more clearly in *Rolleston v. Sinclair*[7], namely, that the doctrine can only be applied when there is no evidence, or no reliable evidence, on the matter. In this case what was clearly proved, by reliable evidence, was that the will had not been duly executed and therefore there was no room for the operation of the presumption.

The trial in this case was conducted entirely on the basis of a signing by the testator personally, and it is not now open to the respondent to seek to establish the will on the basis of a directed signature. Execution is a question of law based on fact. "The course "of practice has always been regarded as well settled that points of "law alleged to entitle the party raising them to verdict or judgment "must be made at the trial, and that if they are not then made they "cannot be raised afterwards"—per Finlay L.C. in *Banbury v. Bank of Montreal*[8].

Jones Q.C., *Lowry Q.C.* and *Babington* for the plaintiff and respondent. The evidence in this case is consistent with a finding either of a personal assisted signature or of a signature by direction. As to personal assisted signature see *Wilson v. Beddard*[9]; *Lewis v.*

1 (1874) L.R. 3 P. & D. 172.
2 [1932] I.R. 574.
3 (1838) 1 Curt. 914.
4 (1845) 1 Rob. Ecc. 262.
5 (1890) 15 P.D. 170, 179.
6 (1887) 21 L.R. Ir. 152.
7 [1924] 2 I.R. 157.
8 [1918] A.C. 626, 659.
9 (1841) 12 Sim. 28.

Lewis[1]; *Harrison v. Elvin*[2]; *Bell v. Hughes*[3]; *Re White*[4]. The attesting witnesses were not cross-examined on the issue of execution and the appellant is bound by the course of the trial. In any case, whether or not the evidence showed a positive physical contribution by the testator, it would be sufficient if he merely suffered his hand to be moved. It is not required that he should contribute to the extent of actually participating in the formation of the letters of the mark. On the authorities the minimum requirement would appear to be that there must be evidence of a kind which would enable it to be said that the testator's mind went with the pen. There is medical evidence in this case to show that the testator could have indicated resistance had he so wished.

If, however, this was not a case of personal signature, then the evidence is capable of being interpreted to show a signature by direction. There is a serious fallacy in the argument advanced to support the contention that it is necessary to have both a direction and an acknowledgment. In order to understand the true position it is helpful to compare section 9 of the Wills Act, 1837, with the pre-existing requirements of section 1 of the Irish Statute of Frauds, 1695. That section 9 was designed to ease the situation is apparent from the fact that it omitted the word "express" before the word "direction"; permitted the acknowledgment of a previously made signature; and reduced the number of necessary witnesses from three to two.

A survey of the authorities and the text-books shows that section 9 should not be interpreted as requiring acknowledgment by the testator when the direction to sign was given in the presence of the witnesses: see Mortimer's Probate Practice, 2nd ed., pp. 97, 104-5; *In re Bailey*[5]; *In re Clark*[6]; *Jenkins v. Gaisford*[7]; *Parker v. Felgate*[8]; *Kevil v. Lynch*[9]. What is required is *either* direction or acknowledgment in the presence of the witnesses: *In re Marshall*[10]. *In re Summers*[11] is not an authority for saying that both direction and acknowledgment are necessary. The reason why it was necessary to prove a direction in that case was because the acknowledgment was made after the witnesses had signed. In *Burke v. Moore*[12] the direction was not in the presence of the witnesses and consequently acknowledgment was necessary. See also *In re White*[4] and *In re Gibson*[13].

1 (1861) 2 Sw. & Tr. 153.
2 (1842) 3 Q.B. 117.
3 (1880) 5 L.R. Ir. 407.
4 [1948] D.L.R. 572.
5 (1838) 1 Curt. 914.
6 (1839) 2 Curt. 329.
7 (1863) 3 Sw. & Tr. 93.
8 (1883) 8 P.D. 171.
9 (1873) I.R. 8 Eq. 244.
10 (1866) 13 L.T. 643.
11 (1850) 2 Rob. Ecc. 295.
12 (1875) I.R. 9 Eq. 609.
13 [1939] 1 D.L.R. 591.

In circumstances like the present, where the facts adduced to prove a personal signature nonetheless show a perfectly good signature by direction the court should strive to give effect to a genuine act of execution and a matter of form should not be allowed to stand in the way: *In re Peverett*[1]; *Re Denning*[2]; *Clery v. Barry*[3]; *Wright v. Rogers*[4]. *Lloyd v. Roberts*[5] indicates the lengths to which the courts will go on the presumption of due execution. In *Cooper v. Bockett*[6], which was referred to in *Wright v. Sanderson*[7], the court's decision in favour of due execution must have been based on something other than the evidence given by the witnesses. A further illustration of the application of the presumption of due execution is to be found in the "lost will" cases: see *Harris v. Knight*[8]; *O'Meagher v. O'Meagher*[9]. In *Rolleston v. Sinclair*[10] there was no attestation clause.

In this case there was evidence upon which a jury, if properly directed, could find in favour of due execution. Even if there had been a misdirection the verdict must stand if it is one which a jury must inevitably have arrived at with a proper direction. The position is that a full direction on the requirements for a personal or a directed signature would have produced the same result. The only additional effect of such a direction would have been that the jury would have indicated which kind of signature had been made. If the jury, by their answer to a question, show that they believe the evidence, and if the judge's charge included a correct view of the law, then a court of appeal is in a position to say: "If this was not a "personal signature, the only logical conclusion is that it was a "directed signature." That is the lesson to be drawn from *Schawel v. Reade*[11] though that was a case concerned with a totally different subject matter. It is open to this court to make an inference of fact and to allow the answer to question 1 to stand. As to "the course of "the trial" see *Devine v. Carson & Co. (Belfast) Ltd.*[12].

Cur adv. vult.

LORD MACDERMOTT L.C.J.: In this suit the plaintiff propounds, as the last will of Albert Joseph Fulton who died on September 3, 1957, a document dated August 20, 1957, which I shall call the "second "will." The plaintiff is a cousin of the deceased. He is the executor appointed by the second will which purports to revoke all former

1 [1902] P. 205.
2 [1958] 2 All E.R. 1.
3 (1887) 21 L.R. Ir. 152, 177.
4 (1869) L.R. 1 P. & D. 678.
5 (1858) 12 Moore P.C.C. 158.
6 (1843) 3 Curt. 648.
7 (1884) 9 P.D. 149.
8 (1890) 15 P.D. 170.
9 (1883) 11 L.R. Ir. 117.
10 [1924] 2 I.R. 157.
11 [1913] 2 I R. 64.
12 [1929] N.I. 26.

wills and to dispose of the deceased's whole estate by leaving it in four equal shares to four specified groups of cousins. As a cousin, the plaintiff's beneficial interest under this disposition would be an eighth share of the entirety. The defendant propounds an earlier document, dated July 26, 1957, which I shall call the "first will." It appoints the defendant executor and purports to leave the whole estate to him. The defendant is the son of a cousin of the deceased and is not, therefore, a beneficiary under the second will. He alleges that the second will was not duly executed; that at the date thereof the deceased was not of sound mind, memory and understanding; that he did not know and approve of its contents; and that its execution was obtained by the undue influence of the plaintiff and of the Reverend John J. Forbes whose mother was a cousin of the deceased.

At the trial, before Sheil J. and a jury, the plaintiff succeeded in establishing the second will, the questions regarding it as to execution, capacity, knowledge and approval and undue influence being all answered by the jury in his favour. The questions left to the jury concerning execution, capacity and knowledge and approval as respects the first will were, in the circumstances, left unanswered.

The defendant now seeks to have the second will condemned and the first will established on a variety of grounds relating for the most part to the state of the evidence and certain alleged misdirections in the summing-up of the learned judge.

In probate suits a particular issue often becomes dominant in the sense that the finding on it indicates what the other, or some of the other, findings should be. Thus, it sometimes happens that a finding of due execution will mean that there was knowledge and approval and, it may be, capacity as well. Everything depends on the circumstances of each case and how the issues are inter-related. Here it seems to me that in relation to the merits of the case there is a dominant issue, namely, that raised by the plea of undue influence, the finding on which cannot but have an important bearing on the issues of capacity and knowledge and approval. That is not to say that the issue as to the execution of the second will is of a subsidiary character. On the contrary, it is decisive and of the first importance; but, as will be seen, it depends largely on considerations of a technical nature, and a finding on it against the second will would be quite compatible with findings on the other issues in favour of that will.

It will be convenient to take these other issues first and to start with that which I consider dominant, the issue of undue influence.

[His Lordship then dealt with the matters raised on the issue of undue influence and continued:] The learned trial judge explained the nature of undue influence to the jury and I am unable to find any misdirection in his charge on this issue which would vitiate the jury's finding upon it. There was abundant material on which to ground that finding and in my opinion it cannot be disturbed. Having reached this conclusion it seems to me that the findings as to knowledge and approval and capacity must also stand. The evidence was clearly sufficient to support both these findings and, again, I can discern no misdirection sufficient to vitiate them.

I turn next to the issue of due execution which presents two aspects of some difficulty, namely, (1) the true construction and effect of the material provisions of section 9 of the Wills Act, 1837, and (2) the application of that section to the facts as disclosed in the transcript of the evidence. I shall come at once to the requirements of the statute, pausing only to observe that the defendant's submission is, in its substance, two-fold—first that the evidence shows positively that those requirements were not satisfied, and secondly that there was an important misdirection as to their nature. The relevant part of section 9 reads as follows: "... no will shall be valid unless it shall "be in writing and executed in manner hereinafter mentioned; "(that is to say,) it shall be signed at the foot or end thereof by the "testator, or by some other person in his presence and by his dir- "ection; and such signature shall be made or acknowledged by the "testator in the presence of two or more witnesses present at the "same time, and such witnesses shall attest and shall subscribe the "will in the presence of the testator....."

This section provides two ways in which a testator may execute his will and two ways in which either method of execution may be witnessed. The testator may execute by signing the will himself or he may have the signing done by his direction and in his presence by someone else. Whichever mode is adopted the testator must, of course, intend to have the document executed as his will. But the signing enjoined by the section need not be a written signature; a mark made with the necessary intent will suffice: see *Baker v. Dening*[1] and *In the Goods of Clarke*[2]. And the testator's direction to another to sign on his behalf need not be expressed formally or even voiced. It is enough if the testator manifests his direction by his conduct: see *Parker v. Parker*[3].

[1] (1838) 8 Ad. & E. 94.
[2] (1858) 1 Sw. & Tr. 22.
(1841) Milward 541.

The first of the section's alternative witnessing procedures provides that the signing shall be in the presence of the witnesses. The second provides for what is to happen when the will is not signed in the presence of the witnesses. The signing must then be "acknowledged "by the testator" in their presence. Like the direction to sign, such an acknowledgment need not be formal or made by the testator in words: see *Todd v. Thompson*[1] and *Inglesant v. Inglesant*[2].

This second method of witnessing has no direct bearing on the instant case, for everything respecting the preparation and execution of the second will took place in the presence of the witnesses who were alone with the deceased from the beginning until the end of this will making. But the requirement as to an acknowledgment by the testator was the subject of a submission on behalf of the defendant which may be conveniently noticed now. It was to the effect that if a will is signed by another by the direction of the testator, it has also to be acknowledged by the testator in the presence of the witnesses even though the direction to sign and the signing pursuant thereto have already taken place in their presence. I cannot accept this as the meaning of the statute. Where the agent receives his direction in the absence of the witnesses but signs in their presence it would seem that, to comply with the section, the testator must subsequently acknowledge the signature in the presence of the witnesses: see *Burke v. Moore*[3]. That is understandable, for in such a case the witnesses, not having witnessed the direction, would have no certain means of identifying the testator with the signature unless he acknowledged it. But where they witness both signature and direction, an acknowledgment by the testator in addition does not appear to be required by either the scheme or the wording of section 9. The signature so directed is within the words "such signature" and it must either be made *or* acknowledged in the presence of the witnesses. If so made, that is, directed and made before the witnesses, it does not need to be acknowledged. Execution by the testator in his own hand before the witnesses does not require an acknowledgment, and where the act of execution consists of the signature of the testator's agent together with the direction which makes that signature the testator's act, the same words of the section give the same alternative. Accordingly, if the signature here were made by direction of the deceased and not by the deceased himself, I would hold, the witnesses being present throughout, that the mere absence of a subsequent acknowledgment would not render the execution defective.

[1] (1863) 9 L.T. 177.
[2] (1874) L.R. 3 P. & D. 172.
[3] (1875) I.R. 9 Eq. 609.

If a testator does not choose to direct another to sign in his presence on his behalf, the section, as we have seen, provides that he must sign himself. But what has now to be considered, on account of the extreme physical infirmity and weakness of the deceased, Albert Joseph Fulton, and the nature of the evidence as to execution, is what will be enough to rank in law as a signing by the testator himself. Must he append his signature or mark by his own unaided efforts? Or, can he be helped to accomplish the physical act of signing by name or mark? And if so, what participation by the testator will be sufficient?

At first blush the language of section 9 might suggest that if a testator could not do the signing by himself, the only permitted alternative was to authorise someone else to do it for him. But by 1837 Parliament must have contemplated that the bodily state of testators would vary enormously and that, apart altogether from the need to cater for illiterates, weakness or other form of physical incapacity might make the task of directing an agent as difficult as that of signing without help. How far such considerations shaped the practice may be a matter of speculation, but the practice certainly developed to the extent of allowing the testator's hand to be guided or assisted while he signed, and of regarding a signature so made to be the signature, not of an agent, but of the testator. This practice has been recognised by the courts on many occasions and must now be taken as well settled. See, for example, *Wilson v. Beddard*[1]. That case was decided under the English Statute of Frauds (29 Car. II, cap. 3 s. 5), as the testator died in 1826, but the decision is clearly applicable to cases under the Act of 1837. There, the testator signed by his mark on the day before his death. He was extremely ill and his hand was guided by another person. Dealing with this the Vice-Chancellor, Sir Lancelot Shadwell[2], said: "Next, it was contended that what the "learned Judge said with reference to the testator's hand being guided "when he made his mark to his will was not law. The Judge said that "it was necessary that the will should be signed by the testator, not "with his name, for his mark was sufficient if made by his hand, "though that hand might be guided by another person; and, in my "opinion, that proposition is correct in point of law. For the Statute "of Frauds requires that a will should be signed by the testator or by "some other person in his presence and by his direction; and I wish to "know if a dumb man, who could not write, were to hold out his "hand for some person to guide it, and were then to make his mark,

[1] (1841) 12 Sim. 28. [2] Ibid. 33.

"whether that would not be a sufficient signature of his will. In order "to constitute a direction, it is not necessary that anything should be "said. If a testator, in making his mark, is assisted by some other "person and acquiesces and adopts it; it is just the same as if he had "made it without any assistance." That passage suggests that the act of signing was the testator's and also, I think, that what happened could be looked upon as a direction to the person assisting. The two modes may sometimes run together or overlap; but I regard the later decisions as showing that the sufficiency of the guided hand does not necessarily rest on an implied direction. In *Lewis v. Lewis*[1], the matter in question related to the subscription of the attesting witnesses, but the decision is no less applicable to the signature of a testator. Neither attesting witness was able to write and their names were written for them by the writer of the will, each witness in turn holding the pen at the top while his name was written. It was held to be a good subscription, Sir Creswell Creswell observing[2]: "I think "the affidavits show that the party, by holding the pen, was taking "some share in the act of writing, and I cannot distinguish as to "quantum." In reaching this conclusion the learned judge followed the decision in *Harrison v. Elvin*[3]. There, one of the witnesses could not read or write and his name was subscribed by the other witness who held and guided the illiterate's hand and, in the words of the latter, "wriggled it about on the paper." The court (Lord Denman C.J., Patteson, Williams and Wightman JJ.) held, after deliberation, that the signature made by the illiterate in this fashion must be taken as his signature and a good subscription. It may be noted that in that case, as in *Lewis v. Lewis*[1], there was no question of implying a direction to an agent from the circumstances, since the statute makes no provision whereby a witness may subscribe otherwise than by his own act. In *Bell v. Hughes*[4], Sarah M'Alden, an attesting witness who could not write, got another to sign her name for her. While this was being done Sarah M'Alden "touched" the pen. This was held to be a good subscription by the attesting witness. Warren J. starts his judgment with a statement of the law as laid down by the authorities, which reads as follows[5]: "On the part of a testator an acknowledg- "ment of his signature is sufficient. An acknowledgment of his own "signature by a witness is not sufficient. The result of the cases is "that there must be some physical act by the witness; some physical "act done by the witness in connection with the transfer of the ink to

1 (1861) 2 Sw. & Tr. 153.
2 Ibid. 155.
3 (1842) 3 Q.B. 117.
4 (1880) 5 L.R. Ir. 407.
5 Ibid. 408.

"the paper, and done with the intention to attest the paper; these "three things are requisite. It is not important what the physical act "done by the witness may be....."

In the light of the authorities there is now, in my opinion, no doubt as to how the first two of the questions which I have posed above should be answered. A testator wishing to execute his will himself need not depend solely on his own efforts; he may be helped to make his signature by name or mark. The extent to which a testator so aided must participate brings us to a difficult borderline which can hardly, in the nature of things, be described in detail or exhaustively. On the cases, however, I think this may be said. The testator must do some physical act in connection with the signing: the sufficiency of the act is not a matter of efficiency or degree, and in itself the act may be quite inadequate to accomplish the signing: but, considered in relation to the surrounding circumstances, it must suffice to indicate, on the part of the testator, an intention to execute his will.

A voluntary holding of the pen while the signature is made would be an act capable of manifesting such an intention and of constituting a personal signing by the testator which would satisfy the statute. And the same might be said of a touching rather than a holding of the pen, provided the touching is deliberate and involves some physical act sufficient, in its setting, to evince a testamentary intention. But the word "touch" is ambiguous and capable of creating confusion. It may mean a voluntary touching which is only distinguishable from a voluntary holding by the absence of an appreciable grip. On the other hand, it may merely signify that the pen is physically in contact with some inert part of the testator's body, such as his hand. In the latter case I do not see how the resulting signature could be regarded as made by the testator within the meaning of section 9 or, indeed, at all. He would have done no physical act in connection with the signing, and the existence of a passive physical contact would not of itself indicate an intention to execute. Here I must refer to the case of *Ryan v. Ryan*[1], to which my attention has been drawn by Black L.J. since the hearing. That was a decision of Barton J., sitting without a jury, admitting to probate the will of a testator made between two and three months before his death. At the time of the will-making the testator was paralysed in every part of his body save his throat and the features of his face. He could not speak except to make some sounds which only his wife could understand; he could not make a

[1] (1903) 4 N.I.J.R. 164.

gesture with hand or finger or express assent or dissent by nodding or shaking his head; but he was of sound mind, memory and understanding and a way of giving instructions to his solicitor was devised whereby the testator closed his eyes to express an affirmative answer and kept them open if he wished to answer in the negative. The execution is thus described in the judgment of Barton J.[1]: "After the "will was drawn up, it was read over to him, and he expressed his "approval in the same way by the closing of his eyes. The pen was "held in his hand for the making of his mark. The execution was "otherwise complete, and the will was signed in this way and acknowledged in this way in the presence of Mr. Frewen [the solicitor] and a "neighbour and friend of testator, who was called in for the purpose." I cannot regard this decision as authority for a conclusion different to that which I have expressed. If what I have said is correct, there could have been no personal signature by the testator in that case for he was not capable of doing any physical act in connection with the signing. It may be that the circumstances were thought to imply a signing by direction, but the requirements of section 9 are not referred to in the judgment and nothing is said respecting the questions I have been discussing.

In the course of the argument in the present case it was also said that if a testator allowed a passive contact to continue, when able to break it if he so desired, there would be a sufficient participation on his part in the signing to make the signature his for the purposes of the section. I cannot accede to this submission. I have been unable to find any authority to support it; and, apart from that, it seems to me that the section requires something of the testator which is positive and discernible and not just a matter of abstention. The formalities of the statute are a guard against fraud, and to hold that its positive provision that a will must be "signed.... by the testator" can be complied with by a purely negative course of conduct would be, in my opinion, to run contrary to the spirit and purpose of the legislation as well as to the natural meaning of its language.

What I have been saying relates to what I have called a personal signing by the testator. As I have observed earlier, the direction necessary to lead to the execution of a will by an agent can be a matter of conduct, and it may be that such a direction can, on occasion, be implied from what is a negative rather than a positive attitude on the part of the testator. One must, of course, have regard to all the circumstances, but speaking generally, I think conduct on the part of

[1] (1903) 4 N.I.J.R. at 165.

a testator which would not justify a finding that he himself had executed his will personally might well be capable of implying a direction to someone else to sign on his behalf. Take for example this instance—and here I deliberately keep away from the facts of the present case: a testator who is completely powerless in his limbs says to his solicitor, who has drawn his will according to his instructions, "Now put my hand on yours", and the solicitor then writes the testator's name with the testator's limp fingers upon his. That, for the reasons I have stated, would not, in my opinion, amount to a personal execution by the testator, but in the absence of something to indicate the contrary I do not see why it should not be regarded as a signing by direction.

I must now turn to the facts of the present case in so far as they relate to the execution of the second will. The witnesses were Mr. Samuel Fyffe, a solicitor's clerk of long experience in the firm of Wilson and Simms, the solicitors who had previously acted for the deceased, and Mr. Gerard J. McCanny, a solicitor of accepted personal and professional integrity who was acting on behalf of Mr. Simms, the principal of the firm I have mentioned and then on holiday. On their admission to the ward in which the testator was lying screens were placed round the bed, and after some preliminaries the testator's instructions for his will were given and noted and the will itself was drawn by Mr. Fyffe. As I have indicated, the testator was alone with Mr. Fyffe and Mr. McCanny when the will making commenced and throughout all that was done thereafter. The testator was lying in bed. He was weak, but according to the witnesses clear in mind and quite clear as to what he wanted done. The evidence as to execution is contained exclusively in the testimony of these witnesses at the trial. Mr. Fyffe was examined first. Having written out the will, this witness said he read it over to the testator, who confirmed that he was satisfied that he (Mr. Fyffe) had carried out his wishes. The note of Mr. Fyffe's evidence at this point continues: "Then the will was executed by his mark in our presence and Mr. "McCanny and myself signed as witnesses in his presence." When asked if Mr. McCanny said anything at this time Mr. Fyffe replied: "Actually before the will was executed Mr. McCanny said 'Is that "'what you want now?', and he said it was." In answer to the question "Could you tell us how that mark was made?" Mr. Fyffe said: "Well his fingers were locked, he had difficulty, my Lord, and "Mr. McCanny placed the pen in his fingers and the mark was made." Then, to the judge who asked: "Mr. McCanny still steadied his hand, "did he?" he said: "Yes, my Lord, he had to hold his hand." Later

the judge recalled this piece of evidence about Mr. McCanny holding the testator's hand and Mr. Fyffe said: "Yes. He put the pen between "his fingers and he held his hand and he made his mark you see, "touching the pen." At this juncture, according to counsel, Mr. Fyffe demonstrated in the witness box to show what he meant to convey. Then, being asked if anyone signed the paper after that, he said: "Oh no, oh just the witnesses signed after he had made his "mark."

The relevant part of Mr. McCanny's evidence as respects execution is contained in these two passages from the transcript—

"Q. And did you ask him any question yourself, Mr. McCanny?

"A. Before he executed the will I asked him was he satisfied—'Is "'that the way you want it?' I think was the phrase I used, "actually.

"Q. And what did he say to that?

"A. He said 'Yes, that's the way, that's right'."

Then comes a question which, admittedly, is not perfectly transcribed but which the learned judge thinks was probably something like "Well now, did you then come to the execution of the will?", the answer being "Yes, my Lord." After that is the second passage which reads thus:

"Q. How was he lying—how was he in bed, Mr. McCanny?

"A. He was lying normally, as a person lies in bed. His head may "have been a little raised, but that would be all. He was lying "prone in bed.

"Q. And how was the will executed?

"A. I took the will and the pen and I backed the pen against his "fingers and I made the mark.

"Q. Well now, was it you made the mark?

"A. I made the mark.

"Q. And the pen actually itself, where was it?

"A. It was in contact with his fingers—his hands—

"Q. Were his hands very rigid?

"A. His hands were clasped like that in front of him.

"Q. And when that happened, Mr. McCanny, where was Mr. "Fyffe?

"A. Mr. Fyffe was at his bedside."

All the answers of the attesting witnesses that I have mentioned were

made in their direct examination. In the course of a lengthy cross-examination neither was asked any question about the procedure followed while the will was being executed, or anything directed to whether the testator did any physical act of any degree in connection therewith. In addition to the evidence I have detailed I need only refer to the following excerpts from the cross-examination of Dr. Vine, who was called by the plaintiff on the next day of the trial—

"A. The striking effect of late disseminated sclerosis is a general "stiffening of all muscles which renders movement very "difficult, almost impossible, and that's coupled with a "clumsiness in the actual movements if they could be per-"formed at all. He was quite helpless.

"Q. On the 20th, for instance, could he have held a pen?

"A. He couldn't have held a pen by his own unaided act.

"Q. If someone had peeled a banana for him could he have eaten "it unaided?

"A. No, sir."

And, a little later—

"Q. How much could he have moved a hand in terms of inches?

"A. I can't be certain whether in fact he could not have pulled his "whole hand up. I think perhaps he could.

"Q. Could he have lifted anything?

"A. Not without dropping it or spilling whatever he was trying to "get hold of.

"Q. If you had taken his hand and tried to move it, could he have "offered any attempted resistance?

"A. I think he could have offered some. I would have known if he "were offering some.

"Q. *You* would have known?

"A. Anybody.

"Q. Would a layman have known, do you think?

"A. I think so. I can't be certain.

"Q. It is possible, in fact, that if somebody moved his hand on the "20th, Albert Fulton would not have been able to offer any "noticeable resistance to it?

"A. I think he would have been able to protest.

"Q. Now how would he have protested?

"A. By declining, or saying that he didn't want to."

It may be that the question whether there was proof of a personal signing by the testator's guided hand had not been appreciated or regarded as a live issue during the first day of the trial when the attesting witnesses, Mr. Fyffe and Mr. McCanny, were giving evidence. But I find it hard to think that it was not in mind the following day when Dr. Vine was asked the questions I have just quoted in cross-examination by Mr. Reid on behalf of the defendant: and the point was quite clearly made by Mr. Reid at the conclusion of the plaintiff's case and, again, in his address to the jury in closing when he said: "And so we say that what happened when the pen was "held against his hand and pen and hand moved, it was really Mr. "McCanny's act—Mr. McCanny was signing the will, not Albert "Fulton, for Albert's hand, we say, was as much moved by Mr. "McCanny as was the pen."

The first question to emerge from the evidence I have set forth is whether a jury might properly reach a finding of due execution upon it. I do not consider that the answer to that question can be arrived at simply by stressing Mr. McCanny's reply—"I made the mark." No doubt, he did so in the sense that his was the dominant hand without whose muscular effort the mark would not have been made, but this would not necessarily preclude some degree of physical action on the part of the testator. No doubt, too, this witness has described the contact between the testator and the pen in a way which, taken literally, is compatible with, and may even suggest, a passive touching on the testator's part. But the jury were in a position to look beyond these pieces of evidence. They saw Mr. Fyffe's demonstration in the witness box of how the testator ".... made his mark you see, "touching the pen"; they heard Mr. Fyffe say that the testator had made his mark and that he had difficulty and Mr. McCanny had to hold his hand; and they had listened to both attesting witnesses describing what took place in terms that, if accepted, would leave no doubt about the testator's anxiety to make a will. It is, I think, unfortunate that more was not done to clarify the testimony of these witnesses on the details of execution and to put to them the case which the defendant now seeks to build upon what they said. But taking the evidence as it stands and viewing it in the light of all the circumstances surrounding the making of this will, as the jury would be entitled to view it, I have come to the conclusion that there was certainly some evidence on which twelve reasonable men, properly instructed, might find in favour of due execution by a testator who wanted to make his will and was still capable of sufficient voluntary muscular movement to manifest that intention by some degree of

physical participation. Whether the evidence sufficed to show a signing by direction is another matter and one on which I need not now enter. That was not the case made at the trial. Whether it could or would have been made had the available details been amplified by a cross-examination directed to establishing the contentions of the defendant, is at present a matter of speculation.

The next question is whether there was a sufficient direction to the jury concerning execution. If the views I have expressed respecting section 9 are right, I think it must follow that there was not. In the circumstances, I think the jury should have had the requirements of the statute, particularly those relating to a personal signing, explained more fully. In the course of this explanation they should have been informed that some physical contribution by a testator making his mark with the aid of another was necessary, and that it was for them to determine, on the evidence of Mr. Fyffe and Mr. McCanny, whether or not any such contribution had, in fact, been made in this case. No such direction was given and the distinction between a passive touching and some degree of physical co-operation was not made clear. The learned judge told the jury that if they accepted the evidence of Mr. Fyffe and Mr. McCanny, the will was properly executed; and he seems to have taken the view that a touching of the pen was enough if, as he put it, the testator's "mind goes to what "he's doing." In this connection the judge also said—"The evidence "—and we're on execution only—the evidence of Mr. McCanny and "of Mr. Fyffe is that the deceased man's hand was touching the pen "when the mark was made. True it is, as Mr. Reid said, that one of "them said that the man's hand was lifted and held against the pen, "but if you're satisfied that it was so done with the man's assent, he "being unable to hold the pen, you're quite entitled to say that will "was duly executed." As I read this passage the learned judge was speaking of due execution by the testator personally. If that is so, this direction, on the conclusions of law I have reached, would be wrong, though that is not to say that the evidence referred to might not be relevant to a signing by direction.

In the circumstances with which he was dealing the learned judge also seems to have over-emphasised the importance of the maxim "omnia rite acta esse praesumuntur." There was, on the evidence, an open, crucial, issue of fact respecting the part played by the testator in the process of execution; and, to put it briefly, the charge was at fault because this issue was not sufficiently described to the jury or placed before them as an issue on which they could find one way or the other.

For these reasons—and without any indication as to what the ultimate verdict should be—I must hold that the present finding of due execution cannot stand.

In the result, I am of opinion that there must be a new trial limited, as regard the second will, to the issue of due execution. The issues as to the first will should also be before the court on such retrial lest it becomes necessary to have them decided.

We were not asked to disturb the ruling as to costs in the court below and I do not propose to do so. But much of the hearing before this court was occupied with the issue of undue influence and the other issues on which the defendant and appellant has failed, and I do not think it would be right that he should have his costs of these issues at the expense of the estate. I would for my part order that the defendant should have half his own costs of the appeal out of the estate and should pay the plaintiff half of his costs of the appeal, the plaintiff's costs of the appeal, in so far as not satisfied by the defendant, to come out of the estate.

BLACK L.J. having dealt with the issue of undue influence continued: The issue however as regards the due execution of the will has caused me much more difficulty. Section 9 of the Wills Act, 1837, requires that a will shall be signed by the testator or by some other person in his presence and by his direction, and that such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and that such witnesses shall attest and shall subscribe the will in the presence of the testator.

It has long been settled that under this section, as indeed it had been settled previously under the corresponding section of the Statute of Frauds which this section 9 of the Wills Act superseded, a testator could validly execute a will by making his mark instead of signing his name. And it has also been settled by a series of cases which it is now impossible to overrule, that a testator who for some reason is unable to sign his name or to make his mark by his own unaided efforts can validly execute his will if he is assisted in signing or making his mark by his hand being steadied or guided by another person. See for example *Wilson v. Beddard*[1]. The same question has arisen and the same view has been taken in regard to the "subscription" of the will by the witnesses as required by section 9 of the Act. It appears however always to have been assumed that the testator or witness as the case may be must have himself made some

[1] (1841) 12 Sim. 28.

physical contribution, however slight, to the making of the mark. Thus in *Lewis v. Lewis*[1] two attesting witnesses who could not write held the pen at the top while another person guided it and wrote their names. Sir C. Cresswell said: "I think the affidavits shew that the "party, by holding the pen, was taking some share in the act of "writing, and I cannot distinguish as to quantum." In *Bell v. Hughes*[2] a witness to the will was unable to read or write and a third person at her request wrote her name, the witness touching the pen while the signature was made. Warren J., following Sir C. Cresswell's judgment in *Lewis v. Lewis*[1] held that the execution was good and said[3]: "The "result of the cases is that there must be some physical act by the "witness; some physical act done by the witness in connection with "the transfer of the ink to the paper, and done with the intention to "attest the paper; these three things are requisite. It is not important "what the physical act done by the witness may be; nor is it necessary "that the witness should afterwards be able to recognise his mark."

The only case of which I am aware in which a will has been held to have been validly executed by the testator's hand being guided by another person without any physical contribution whatever by the testator himself is *Ryan v. Ryan*[4]. In that case the testator was almost totally paralysed. He was unable apparently to move his hands or his fingers. The pen was held in his hand for the making of his mark. Barton J. held at Nisi Prius that the will was duly executed by the testator. I am unable to follow this decision as reported. Unless there is some explanation which does not appear from the report the decision appears to me to be quite out of line with the current of authority. The report is not a very satisfactory one. No part of the arguments is reported and none of the authorities are referred to in the judgment. The point is not mentioned or even glanced at by the learned judge and one would be tempted to infer that it had not been raised or relied upon. If a point of such vital importance had been raised it would be extraordinary that the judge should not have mentioned it.

Coming now to the evidence regarding the execution of the will in the present case, the impression which I get from the transcript is that the point whether the testator had made any physical contribution to the making of the mark had probably not occurred to anyone during the first day's hearing. Mr. Fyffe's evidence was that the testator's fingers were locked and that Mr. McCanny put the pen

1 (1861) 2 Sw. & Tr. 153.
2 (1880) 5 L.R. Ir. 407.
3 Ibid. 408.
4 (1903) 4 N.I.J.R. 164.

between his fingers and held his hands and that he (presumably meaning the testator) made his mark touching the pen and we were told at the Bar that Mr. Fyffe demonstrated how this was done. Mr. Fyffe's demonstration may have indicated some physical participation even though slight or it may not. Unfortunately we do not know what his demonstration would have conveyed to the jury if they had been directed to the point. At this stage Mr. McCanny had not given his evidence, and if the defence intended to rely on the contention that the testator had physically contributed nothing and that his hands had been completely inert one would have expected some cross-examination of Mr. Fyffe on the point. But the point was not adverted to in the cross-examination of Mr. Fyffe nor indeed in the subsequent cross-examination of Mr. McCanny. When Mr. McCanny came to be examined in chief he was asked "How was the "will executed?" His reply was: "I took the will and the pen and I "backed the pen against his fingers and I made the mark", and in answer to the next question, "Well now, was it you made the mark?" he replied: "I made the mark." Prima facie these answers suggest that the signature was made by Mr. McCanny without any participation even of the slightest degree from the testator. The mere fact that the pen was in contact with the testator's hand, "backed against "his fingers," would not in my view of the authorities be sufficient. In his charge to the jury the learned trial judge instructed them that if they believed the evidence for the plaintiff given by Mr. Fyffe and McCanny they were entitled to say that the will was duly executed. But as I read the evidence Mr. Fyffe's account of how the pen was held and Mr. McCanny's account do not agree. If the view of the law which I have taken is correct a mere passive contact between the testator's hand and the pen as described in Mr. McCanny's evidence, without some physical contribution however slight on the part of the testator, would not amount to a signature by the testator sufficient to satisfy section 9 of the Wills Act. On the other hand Mr. Fyffe's evidence and the demonstration given by him in the witness box may just conceivably have indicated some slight degree of participation on the part of the testator. The jury's attention was not directed to the point by the judge, and though Mr. McCanny's evidence as appearing in the transcript pointed strongly against any participation by the testator I think that there is just a possibility that the demonstration given by Mr. Fyffe may have pointed to some degree of participation upon which a jury might have acted. Accordingly, though I must confess with much doubt and hesitation and largely I fear through a desire to avoid any possibility of an injustice being done through the

distinction having been overlooked by the learned trial judge (just as it would seem from the report to have been overlooked by Barton J. in *Ryan v. Ryan*[1]), I acquiesce in the conclusion of the Lord Chief Justice that there should be a fresh trial but confined to the issue of whether the will was duly executed in accordance with the requirements of the Wills Act.

In dealing with this issue of execution I have treated the case as one in which the question was whether the will was signed by the testator and not as one in which it was suggested that the alternative method sanctioned by section 9 of the Wills Act was adopted, namely, by the will being signed by some other person in the testator's presence and by his direction. I have done so because at the trial the case presented throughout on behalf of the plaintiff was that the signature (or rather the mark) was an execution of the will by the testator himself. The very fact of the pen being inserted in or put in contact with the testator's fingers appears to point strongly to the conclusion that in the parties' mind the nature of the ceremony was an execution of the will by the testator personally.

CURRAN L.J.: I respectfully agree that the finding of the jury on the issue of undue influence should stand, and that the finding of due execution cannot stand. There is nothing I can usefully add to the reasons given in the judgments just delivered. I do not find, however, in the evidence of the two relevant witnesses, Mr. Fyffe and Mr. McCanny, any suggestion of a physical contribution by the testator in the making of his mark. On the contrary, the evidence of Mr. McCanny, in my view, is clear and unambiguous. [His Lordship then detailed the evidence, and continued:]

There is a lack of clarity in Mr. Fyffe's evidence, but I do not find any suggestion of a positive physical contribution by the testator in the making of the mark. The touching of the pen by the testator, even in Mr. Fyffe's evidence, was achieved by Mr. McCanny placing the pen in testator's locked fingers.

Having regard to the evidence to which I have referred, my view is that the plaintiff, in a new trial, could only succeed in establishing due execution if Mr. Fyffe and/or Mr. McCanny varied the evidence already given. In my opinion a new trial should not be granted for the purpose of giving a plaintiff a second opportunity of proving something he has sought to, but has failed to establish, in the first trial.

[1] (1903) 4 N.I.J.R. 164

I would allow the appeal and would give the respondent his costs out of the estate.

Appeal allowed.

Solicitors for the appellant: *Thos. Elliott & Son.*
Solicitors for the respondent: *Wilson & Simms.*

S.M.M.

PRACTICE DIRECTION

Whereas it appears that the practice whereby in jury actions the junior counsel for the plaintiff or the petitioner opens the pleadings serves no useful purpose and might with advantage be discontinued.

Now I, the Right Honourable John Clarke, Baron MacDermott, Lord Chief Justice of Northern Ireland, after consultation with the several judges of the Supreme Court of Northern Ireland, the Bar Council and the Incorporated Law Society of Northern Ireland, do hereby direct that henceforth the said practice shall be discontinued.

Dated this 20th day of February, 1961.

Signed,

MacDermott,

Lord Chief Justice.

GALLAGHER v. N. McDOWELL LTD.[1]

Negligence—Building contractor—Dwelling-house erected by contractor for landlord—Defect in floor causing injury to first tenant—Duty of contractor to take reasonable care for the safety of persons lawfully using the house—House inspected and passed by the landlord's architect on completion—Effect of inspection on contractor's duty to take care.

A dwelling-house was erected by the defendants, a firm of building contractors, for the Northern Ireland Housing Trust and on completion was inspected and passed by the Trust's architect. The plaintiff's husband was the first tenant of the house and he and the plaintiff went into occupation six days after the house had been inspected and passed. Eighteen months later when the plaintiff was walking over the wooden floor in one of the rooms wearing ordinary high-heeled shoes she fell and was injured by reason of the heel of her shoe having gone through the floor. Examination showed that a hole in a floor board had been repaired by the insertion of a plug of wood shaped to fit the hole and this plug had given way under the plaintiff's heel.

In an action for negligence by the plaintiff against the defendants, expert evidence was led by the plaintiff to show that the method adopted to repair the hole was not a proper method, and that in any event the plug had not been fitted in a workmanlike manner. At the conclusion of the case for the plaintiff the trial judge withdrew the case from the jury and gave judgment for the defendants on the ground that the defendants owed no duty in tort to the plaintiff.

Held, by the Court of Appeal, reversing the decision of the trial judge; (i) that there was sufficient evidence to go to the jury that the hole had been made and plugged, or at any rate plugged, by the defendants; (ii) that the defendants owed a duty to the plaintiff, as a lawful user of the house they had constructed, to take reasonable care in the repair of the hole; (iii) that, on the evidence, although the defendants and their workmen could have anticipated the examination of the house which did in fact take place, they could not reasonably have anticipated that such inspection would expose the danger, and that accordingly there was no sufficient "reasonable possibility "of intermediate examination" to absolve the defendants from their duty to take care.

Donoghue v. Stevenson [1932] A.C. 562 applied.

APPEAL from a direction in favour of the defendants given in an action tried by Curran L.J. and a jury.

The facts of the case are set out in the judgment of Lord MacDermott L.C.J.

Stewart Q.C. and *Lavery* for the plaintiff and appellant.

Lowry Q.C. and *McQuitty Q.C.* for the defendants and respondents.

Cur. adv. vult.

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black L.J. and Sheil J.: Mar. 28, 29, 30, Dec. 2, 1960.

LORD MACDERMOTT L.C.J.: In this action the plaintiff and appellant claims damages for personal injuries which she alleges were caused by the negligence of the defendants in the construction of the dwelling-house, 53 Carnmeen Drive, Rathcoole, County Antrim, in which she lives with her husband and two children, a girl of 12 and a boy of 19. Her husband occupies the house as tenant of the Northern Ireland Housing Trust, a public authority incorporated by the Housing Act (Northern Ireland), 1945, which had caused this and other dwellings on the same estate to be erected under contract by the defendants. The plaintiff's husband was the first tenant of the house, which was, apparently, let to him unfurnished, and he and his family moved into it on December 10, 1956. The daughter occupied a bedroom upstairs and the floor of this room was covered temporarily with linoleum which her parents had brought with them. This floor is of a common type, consisting of spruce boards, $\frac{9}{16}$ inches thick, laid across wooden joists. In June 1958, the bedroom had been redecorated and the old floor covering had been taken off as it was to be replaced by new linoleum. It thus happened, according to the plaintiff's testimony, that on the 25th of that month the floor was bare. During the evening of that day the plaintiff went up to her daughter's room to put a jar in the bed. She was wearing shoes with high heels, and as she moved over the floor her right heel went through it and she fell, hurting herself and causing the condition of which she now complains.

If the evidence adduced on behalf of the plaintiff is accepted, it indicates quite plainly that her right heel went through the floor because at that moment that heel was resting on a small rectangular plug or patch which was filling a hole in one of the floor boards and was not strong enough to withstand the weight that thus came upon it. The evidence also justifies the view that whatever caused the hole to be made in the board—a matter which remains unexplained—it had been repaired in an unworkmanlike manner and without due care. This for two reasons. First of all, the orthodox method would have been to cut the board across where it rested on the joists on either side of the hole and then to insert a new piece of board with either end supported by a joist. And secondly, if a plug were used, it and the hole it filled should have been cut with sides so tapered or sloped that pressure on the upper surface of the plug would not have to be taken, as was the case here, by the sloping edges that ran with the grain and were more likely to give way on that account. The job should have been done so that the plug would have been supported as well by slopes which ran across the grain. In fact, one of the cross-

grain cuts had no slope and the slopes along the grain had, in this way, to bear more than they could withstand. In addition to the note of the evidence we saw the model made by the plaintiff's architect, Mr. Kelly, and what was said to be the actual plug as well as part of the board containing the hole. I need not, however, explore the details of the repair to the floor board more fully as it was not disputed that the evidence sufficed to justify a finding of bad and careless workmanship. But I should add three things. In the first place, there was, in my opinion, sufficient material before the jury to justify them in concluding that a repair by plugging, though not the correct practice to adopt according to Mr. Kelly, would in all probability have been safe enough if the plug and hole had been properly shaped and fitted. Secondly, the hole measured 1¾ inches by 1¼ inches. This is relevant as the area, though small enough not to be very noticeable, was large enough to take the plaintiff's heel without any part thereof being on the adjoining sound flooring. The plaintiff's shoes were put in evidence. There was nothing unusual or exceptional about them. The heels, while rightly described as high, were not of the "spike" or "stiletto" type; they appeared to be of normal dimensions, and a floor which was dangerous for anyone wearing them could not be considered safe for the use of an ordinary household. And thirdly, the evidence would permit of a finding that the appearance of the plug before the accident was not such as to advertise or bring to notice the fact that it was ill-supported and might give way. To the informed it might appear to be a departure from the orthodox practice already mentioned, but, as a repair by plugging, there was nothing to indicate its inadequacy or to warn those wearing high heels to keep clear. On the evidence as it stands, the patch or plug must, for the purposes of this appeal, be regarded as constituting a danger, and a concealed one at that. From the point of view of the occupants of 53 Carnmeen Drive, this was a latent defect in the sense that the jury would have been fully entitled to find that reasonable care on their part would not have discovered that the plug was inadequately seated and supported.

I shall return to the facts later, but it will be convenient now to follow the course of the trial which took place before Curran L.J. and a jury. At the conclusion of the plaintiff's evidence Mr. Lowry, for the defendants, asked for a direction on three grounds which may be summarised thus:

(1) The evidence was insufficient to show that the defendants made the hole.

(2) The evidence did not show that injury by reason of the defect in question was foreseeable.

(3) The defendants, after the house had been constructed and let, did not owe any "duty in tort" to the plaintiff or, indeed, to her husband, the tenant.

The learned judge acceded to this application on the ground that the defendants "owed no duty in tort to the plaintiff." He accordingly withdrew the case from the jury and gave judgment for the defendants with costs. It is from this decision that the plaintiff now appeals.

Before this court Mr. Lowry abandoned the second of the grounds summarised above. As respects the first, I am of opinion that there was evidence from which the jury, if they thought fit, could properly infer that the hole was made and plugged, or at any rate plugged, by the defendants. The plaintiff's husband, in cross-examination, said, according to the note: "I did not make hole nor anyone else to my "knowledge." The plaintiff and her son, who was also a witness, said nothing, and seem to have been asked nothing, to suggest that the hole had been made by them; and the general tenor of the evidence is that the floor was covered from shortly after the tenancy began until shortly before the accident. When the accident happened an official of the Housing Trust gave instructions to have the hole repaired and the repairs appear to have been carried out by the defendants. In these circumstances, and with no other previous occupant who might have been responsible, I think it was certainly open to the jury to take the view that, at the time of the accident, the floor was as the defendants had constructed it.

That brings me to Mr. Lowry's third submission and the heart of the case. Were the defendants under a duty to the plaintiff, as a lawful user of the house they had constructed, to take reasonable care in the repair of the hole in the defective floor board? If they were under such a duty there was, on the views already expressed, a case of negligence to go to the jury and the appeal should be allowed: but if not, the ruling of the learned judge was right and should be affirmed.

Mr. Stewart, for the plaintiff, based his argument on *Donoghue v. Stevenson*[1], the snail in the ginger-beer bottle case, in which the House of Lords decided that a manufacturer of aerated waters was under a legal duty to the ultimate purchaser or consumer to take reasonable care that his products were free from defects likely to cause harm to

1 [1932] A.C. 562.

health. Mr. Stewart relied upon the principle enunciated in this decision, rather than on the decision itself which, as I have indicated, related to a very different factual situation. The principle thus appealed to will be found in the well-known passage in Lord Atkin's opinion, where he says[1]: "But acts or omissions which any moral "code would censure cannot in a practical world be treated so as to "give a right to every person injured by them to demand relief. In "this way rules of law arise which limit the range of complainants and "the extent of their remedy. The rule that you are to love your "neighbour becomes in law, you must not injure your neighbour; "and the lawyer's question, Who is my neighbour? receives a "restricted reply. You must take reasonable care to avoid acts or "omissions which you can reasonably foresee would be likely to "injure your neighbour. Who, then, in law is my neighbour? The "answer seems to be—persons who are so closely and directly "affected by my act that I ought reasonably to have them in con- "templation as being so affected when I am directing my mind to the "acts or omissions which are called in question." In the context of this passage Lord Atkin makes it clear that he is not attempting a complete logical definition of the general principle underlying the duty to take care; but it is no less clear that the passage is couched, deliberately, in broad terms and was intended as a general proposition capable of governing more than the facts of that particular case. It finds support in the opinions of Lord Thankerton and Lord Macmillan, and the width of the principle it states has since been recognised on a number of occasions in relation to other events. See, for example, *Brown v. Cotterill*[2] (a falling tombstone); *Malfroot v. Noxal Ltd.*[3] (attachment of side car to motor-cycle); *Grant v. Australian Knitting Mills Ltd.*[4] (injurious clothing); *Herschtal v. Stewart and Ardern, Ltd.*[5] (defect in reconditioned car); *Haseldine v. Daw & Son Ltd.*[6] (a badly repaired lift); and *Buckland v. Guildford Gas Light and Coke Co.*[7] (electric wires erected close to a climbable tree).

The first matter for enquiry, then, must be whether the present case is, prima facie, within the proposition thus formulated by Lord Atkin. This may be considered at the level of the workman who plugged the hole, for it was not disputed that, if the defendants were liable, their liability was vicarious. Was the plaintiff such workman's neighbour? And, if so, would a reasonable workman have foreseen

1 [1932] A.C. at 580.
2 (1934) 51 T.L.R. 21.
3 (1935) 51 T.L.R. 551.
4 [1936] A.C. 85.
5 [1940] 1 K.B. 155.
6 [1941] 2 K.B. 343.
7 [1949] 1 K.B. 410.

the sort of consequence that happened? The second of these questions is now no longer in issue; and, read literally, what Lord Atkin said calls for an affirmative answer to the first. Who ought the workman, as a reasonable person, to have had in mind as closely and directly affected by what he was doing, if not those who would be using the floor he was laying? And who more likely to suffer from this particular carelessness than a lady in ordinary high-heeled shoes? Houses are made to be lived in and their floors to be walked upon, and the relationship between those who make and those who use dwelling-house floors seems so close and direct as respects the safety of the construction that it is as hard to exclude that relationship from the actual terms of Lord Atkin's proposition as it is to imagine a reasonable workman who would not foresee that the sort of carelessness with which we are dealing would be likely to cause injury.

That poses another question or, rather, a series of questions. (1) Is Lord Atkin's proposition subject to qualification? (2) If it is, does it apply, nevertheless, to defects in house property? And (3) if it does so apply, is it to be qualified in some other manner which would make it inapplicable to this case? I shall take these questions in the order stated.

As to (1). While *Donoghue v. Stevenson*[1] was meant to lay down a broad principle, its test of legal duty is linked to what is reasonable, and I doubt if Lord Atkin was prepared to adopt, as a matter of law, a standard of reasonableness in this connection which would open the door that had just been unlocked to its fullest extent. Apart, however, from this sort of limitation which is inherent in the passage I have quoted, the better view is, I think, that the principle it enshrines was not meant to be applied so literally or widely as to preclude all exceptions. In *Farr v. Butters Bros. & Co.*[2] Scrutton L.J. thought that Lord Atkin's statement needed some qualification, and in *Candler v. Crane, Christmas & Co.*[3] the Court of Appeal, by a majority, refused to apply it to a careless false statement causing financial loss. Moreover, the references made to *Cavalier v. Pope*[4] in *Donoghue v. Stevenson*[5] indicate that the latter decision was not intended to overthrow established immunities in what Lord Macmillan calls "a different chapter of the law." The relationship of barrister and lay client, for example, would seem to fall well within the language used by Lord Atkin, but it would, I think, be going very

1 [1932] A.C. 562.
2 [1932] 2 K.B. 606, 614.
3 [1951] 2 K.B. 164.
4 [1906] A.C. 428.
5 [1932] A.C. at 597, 609.

far to suggest that he or those who agreed with him in *Donoghue v. Stevenson*[1] ever thought of disturbing the barrister's long accepted, if anomalous, immunity from liability for professional carelessness. The fact seems to be that the concept of negligence as a separate cause of action developed too late to avoid certain anomalies. The flood it begot submerged parts of the older law but it had to eddy round and leave intact other parts that derived from the forms of action and the notions of an earlier age.

I therefore answer question (1) in the affirmative and proceed, accordingly, on the footing that the present case falls within the doctrine of *Donoghue v. Stevenson*[1] unless that doctrine must be so qualified as to make it inapplicable.

That brings me to (2). Does the doctrine of *Donoghue v. Stevenson*[1] apply to defects in house property? For the defendants it was contended that it only applied to chattels and that the authorities, far from affording instances of its application to realty, showed that no such application was open in point of law. I need not refer to all the cases cited, but reference must be made to a number of the decisions which were canvassed in the course of the debate.

In *Cavalier v. Pope*[2] the owner of a house with a defective kitchen floor had let it on a weekly tenancy. The tenant and his wife, having gone into possession, threatened to leave if the floor was not made good, whereupon the owner's agent promised to have the necessary repairs done if the husband continued his tenancy. The husband did so, but the repairs were not done and one day the tenant's wife met with an accident due to the chair on which she was standing going through the defective floor. The husband recovered his loss against the defendant owner in the shape of damages for breach of contract. As the injured wife was not a party to the contract the defendant was not liable to her thereunder, but the trial judge held he was responsible to her in tort. This ruling was reversed by the Court of Appeal, founding on *Robbins v. Jones*[3], and *Lane v. Cox*[4], on the ground that the defendant owed no duty to the tenant's wife. On appeal to the House of Lords this decision was affirmed. There was no duty to the wife under the contract; nor was any duty owing to her by the defendant as occupier of the property for it was not he, but the plaintiffs who were in occupation. The wife's claim in tort was not, so far as I can see, based expressly upon the existence of a neighbourly relationship involving a duty on the part of the landlord to

[1] [1932] A.C. 562.
[2] [1906] A.C. 428.
[3] (1863) 15 C.B. (N.S.) 221.
[4] [1897] 1 Q.B. 415.

take reasonable care for the wife's safety. But the case must, I think, be accepted as deciding that the landlord was under no liability in tort of any kind to the wife, whether arising in that way or not. It is also to be observed that the reasoning in *Cavalier v. Pope*[1], both in the Court of Appeal and the House of Lords, centred mainly upon the relationship of landlord and tenant. This, as the foundation of the decision, appears, as clearly as anywhere, in the following passage from Lord Macnaghten's opinion in which he says[2]: "The law laid "down by the Court of Common Pleas in the passage quoted by the "Master of the Rolls from the judgment of Erle C.J. in *Robbins v. "Jones*[3] is beyond question: 'A landlord who lets a house in a danger- " 'ous state is not liable to the tenant's customers or guests for acci- " 'dents happening during the term: for, fraud apart, there is no law " 'against letting a tumbledown house; and the tenant's remedy is " 'upon his contract, if any.'

"In this case the husband was the tenant. The wife, who was not "the tenant, cannot be in a better position to recover damages than a "customer or guest. Her position is, perhaps, less favourable. She "had the advantage or disadvantage of knowing more about the "state of the house than any guest or customer could have known."

In *O'Reilly v. Doherty*[4], the plaintiff, a maternity nurse, when coming from a visit to a subtenant in a house owned by the defendant, fell through the defective hall floor of the house and was injured. She obtained a decree from the Recorder of Londonderry, but this was reversed on appeal to Assizes by Andrews L.J. (as he then was) who delivered a considered judgment holding that the defendant was under no legal duty to the plaintiff as respects her safety on the premises. This judgment examines and applies the reasoning in *Cavalier v. Pope*[5] but does not take the matter further.

In *Bottomley v. Bannister*[6], the Court of Appeal in England had to deal with a case in which the defendants were owners and builders of a house which they had sold to a purchaser whom they allowed to enter pending completion. The kitchen was fitted with a gas-fired boiler from which there was no flue to the outer air. Shortly after going into occupation the purchaser and his wife were found dead in the bathroom, poisoned by carbon monoxide gas which had reached that room from the boiler by way of a linen chute. The boiler

1 [1905] 2 K.B. 757; [1906] A.C. 428.
2 [1906] A.C. at 430.
3 (1863) 15 C.B. (N.S.) 221.
4 [1928] N.I. 32.
5 [1906] A.C. 428.
6 [1932] 1 K.B. 458.

regulator was found set so as to use too much gas. Properly set, the apparatus was not dangerous. The defendants were sued under the Fatal Accidents Act, 1846, for damages for negligence and judgment went against them in the sum of £1,700 on a jury's verdict. This was set aside by the Court of Appeal. It would seem that the evidence did not, on examination, show any fault or lack of care on the part of the defendants, but the judgments also deal with the liability for negligence of vendors of land who are the constructors of the buildings thereon, and it is in that connection particularly that I refer to them. Scrutton L.J. says[1]: "Now it is at present well established English "law that, in the absence of express contract, a landlord of an un- "furnished house is not liable to his tenant, or a vendor of real estate "to his purchaser, for defects in the house or land rendering it "dangerous or unfit for occupation, even if he has constructed the "defects himself or is aware of their existence." It must also be observed that Scrutton L.J. was at pains to find that the boiler, burner and linen chute were part of the realty and that he used this finding, not only in applying the law as stated in this passage from his judgment, but also to distinguish the cases where claims in tort were based on the control of dangerous things. On that he says[2]: "But "these are all cases relating to chattels, and appear to me not to "apply to real property or fixtures forming part of houses." And, again[3]: "My view of the law is that the installation being part of the "realty, the cases as to chattels do not apply....." This distinction between chattels and what is part of the realty was not drawn by Greer L.J. who poses the important issue of the case thus[4]: "Does "the vendor or lessor of a house owe any duty, independently of "contract, to persons who may happen to come to live in the house "either by purchase from him, or as his tenants, to exercise reasonable "care to see that the house is fit for occupation?" Then, after referring to *Cavalier v. Pope*[5] and the position of a landlord who lets a house, he says this[6]: "A purchaser of the freehold is, in my judgment, in no "better position than a tenant. No case was cited to us in which a "tenant or purchaser has ever recovered against a lessor or vendor, "either by implied contract or in tort, by establishing the liability of "the vendor or landlord for injuries sustained through the house or "its fixtures being unsafe at the date of the sale or of the lease."

The same learned judge next refers to "the cases concerned with "the liability of a contractor doing work negligently on another

1 [1932] 1 K.B. at 468.
2 Ibid. 470.
3 Ibid. 474.
4 Ibid. 476.
5 [1906] A.C. 428
6 [1932] 1 K.B. at 477.

"person's premises to people with whom he had no contractual "relations who were damaged by reason of his defective work," and he cites as such cases *Parry v. Smith*[1], *Dominion Natural Gas Co. Ltd. v. Collins*[2] and *Heaven v. Pender*[3]. Speaking of this class of cases, Greer L.J. then continues[4]: "After *Cavalier v. Pope*[5] in the "House of Lords, and *Lane v. Cox*[6], I cannot hold that these decisions "apply to cases between landlord and tenant, or to cases between the "landlord and persons using the premises by licence of the tenant. "The result is unsatisfactory, because in the present case, if the land- "lord instead of doing the work himself before he sold the house, had "done it afterwards as a contractor to Mr. Bottomley, he would have "been liable if there were sufficient evidence that it was negligence on "his part to have installed the Halliday boiler without a flue."

Pausing here, on the threshold, as it were, of *Donoghue v. Steven- son*[7], I think it may be said that the authorities just considered affirm that the owner of land, as such, enjoys under English law two well settled immunities—(1) if he lets his house unfurnished to a tenant he is under no duty (apart from contractual and statutory obligations) to his tenant, or his tenant's family, invitees or licensees, to take reasonable care that at the time of letting the premises are fit for habitation and free from defects of a dangerous kind; and (2) if he sells his house to a purchaser he is under no duty (again apart from contractual and statutory obligations) to the purchaser or to his family, invitees or licensees, to take reasonable care that at the time of sale the premises are, as in (1), fit for habitation and free from defects. I am also of opinion that these immunities are not affected by the fact that the owner has himself constructed the defects.

The next case comes after *Donoghue v. Stevenson*[7]. It is *Otto v. Bolton and Norris*[8], a decision of Atkinson J. There, Miss Otto bought a house from building owners with the warranty that it was well constructed. She and her mother went into residence. The first floor ceilings turned out to be carelessly made and dangerous. This put the purchaser to expense which she succeeded in recovering under the contract. But Mrs. Otto, who suffered personal injuries from a fall of plaster and was not a party to the contract, claimed against the building owners for damages for negligence. Atkinson J. held against her on two grounds. In the first place, he was satisfied that, in

1 (1879) 4 C.P.D. 325.
2 [1909] A.C. 640.
3 (1883) 11 Q.B.D. 503.
4 [1932] 1 K.B. at 477-8.
5 [1906] A.C. 428.
6 [1897] 1 Q.B. 415.
7 [1932] A.C. 562.
8 [1936] 2 K.B. 46.

so far as it confirmed what I have referred to as the immunities of the owner of land, the decision of the Court of Appeal in *Bottomley v. Bannister*[1] had not been affected by the decision of the House of Lords in *Donoghue v. Stevenson*[2] and, accordingly, that the defendants as vendors of realty were not liable in tort to Mrs. Otto though they had built a dangerous house on the land sold. "I can find in no "case," the learned judge says[3], "any suggestion that a builder selling "a house after completion is, in his capacity of builder, under any "obligation to take care towards a future purchaser, let alone other "persons who may come to live in it." The judgment also contains several references to what Scrutton L.J. said about the chattel cases not applying in installations which were part of the realty, and the learned judge then turns to his second ground for disallowing the claim with these words[4]: "But supposing that counsel for the plaintiffs "tiffs are right in saying that the principle of *Donoghue v. Stevenson*[2] "applies to realty as well as to chattels....." After that he tests the proximity of the relationship needed to attract that principle in the light of what was said by the House of Lords about the "possibility of "intermediate inspection" and, holding that the defects were plain to be seen and that there was nothing to prevent inspection, he decides against Mrs. Otto for that reason also. I shall have to refer to this test of proximity later, but I would observe now that I do not read the judgment under consideration as intended to uphold the view that, irrespective of the special position and immunities of an owner of land, the doctrine of *Donoghue v. Stevenson*[2] has nothing to say to any dangerous thing which is not in law a chattel. In the words I have quoted which preface the second ground of his judgment I think Atkinson J. must be assuming that *Donoghue v. Stevenson*[2] "applies "to realty" in the sense that it overrides the established immunities and applies to an owner of land: that is all he had to assume, on the facts of the case with which he was dealing, in order to proceed to the question of inspection.

In *Davis v. Foots*[5], the defendants let a flat to the plaintiff and her prospective husband. Among the articles removed by the defendants was a gas fire which was not wanted by the incoming tenants. This was removed without any step being taken to close or seal off the disconnected pipe conveying gas from the flat meter. The meter was at that time turned off and remained so until a few days later when, on the morning of the plaintiff's wedding, the bridegroom got the

1 [1932] 1 K.B. 458.
2 [1932] A.C. 562.
3 [1936] 2 K.B. at 52.
4 [1936] 2 K.B. at 55.
5 [1940] 1 K.B. 116.

meter turned on again. This caused the gas to escape from the disconnected pipe, but the plaintiff had no experience of gas and when she and her husband took up residence in the flat that evening the danger was not detected and they went to bed, with the result that both became unconscious and the husband died. Wrottesley J. awarded the plaintiff damages, but his judgment was reversed on appeal. In effect, the Court of Appeal affirmed the decision of Atkinson J. in *Otto v. Bolton and Norris*[1], MacKinnon L.J. holding that the defendants as landlords owed no duty and were under no liability, and du Parcq L.J. (as he then was) reaching the same conclusion on that ground and also on the second ground given by Atkinson J. for his decision in the earlier case, namely, that the doctrine of *Donoghue v. Stevenson*[2] did not impose liability as there was a reasonable opportunity for examination and the defect was apparent and not latent. Presumably, the pipe which was left in such a dangerous condition was part of the realty, but this is not referred to as in itself distinguishing *Donoghue v. Stevenson*[2].

Then there is *Travers v. Gloucester Corporation and others*[3]. In that case one of the defendants, a construction company, had built the house in question for the defendant corporation. It contained a geyser, the vent pipe of which terminated against an outside wall under the eaves of the house. This was a dangerous installation and the defect had been brought to the notice of the defendant corporation by the local gas company which was also made a defendant. As a result of the dangerous state of the installation a lodger using the bathroom was gassed and died. The action, brought by his mother as a dependant, claimed damages for negligence. It was admitted that, in the light of the particular facts of the case, the construction company was not at fault and the defendant corporation, the landlord, became the principal defendant. Lewis J., after considering the authorities, held against the plaintiff on the grounds which Atkinson J. had founded upon in *Otto v. Bolton and Norris*[1]. The defendant corporation was to be regarded as a landlord; and "there was "undoubtedly ample opportunity of inspection." Again, the point stressed was not that the defect lay in what was realty, but that it was the owner of the realty who was sued.

I refer to *A. C. Billings & Sons Ltd. v. Riden*[4] in the present context for a limited purpose. This decision of the House of Lords overrules *Malone v. Laskey*[5] in so far as that case held there was no duty to

1 [1936] 2 K.B. 46.
2 [1932] A.C. 562.
3 [1947] K.B. 71.
4 [1958] A.C. 240.
5 [1907] 2 K.B. 141.

take reasonable care and therefore no negligence. There, the defendants' workmen had secured a water tank in a house lavatory so carelessly that a supporting bracket fell on the wife of the caretaker of the premises, injuring her. The Court of Appeal decided against the wife's claim on the ground that as the defendants were not the occupiers and had not contracted with the wife, they owed no duty of care to her. *Malone v. Laskey*[1] would, therefore, be decided to-day the other way: and so decided it would rank as one of a group of cases in which liability was established in respect of dangerous things that formed part of the realty—cases which appear to come so well within the terms of Lord Atkin's general proposition in *Donoghue v. Stevenson*[2] that to put them outside it in a different category would seem quite irrational. *Parry v. Smith*[3] and *Dominion Natural Gas Co. Ltd. v. Collins*[4] are examples of this group. Another example may be found in the Scottish case of *Mooney v. Lanarkshire County Council*[5] in which *Malone v. Laskey*[1] is distinguished, and the Lord Justice-Clerk (Lord Thomson) says this[6]: "I refuse to countenance "the idea that contractors employed to carry out a job on somebody "else's premises are entitled to say that their liability to a person "injured is to be measured in terms of the relationship between the "person injured and their employer. That would be to affirm some-"thing in the nature of constructive possession and control, and I can "see no reason why the tradesman's liability should be limited on "that basis."

In my opinion, the cases since *Donoghue v. Stevenson*[2] show that the land-owner's immunities, which I have described as settled before that decision, have not been disturbed by it. But the fact that these immunities arise in relation to defects and dangers on land does not mean that the law imposes no neighbourly duty of reasonable care as respects defects and dangers of that kind. The immunities attach to land-owners as such, and I do not think one is at liberty to jump from that to saying that the law of negligence in relation to what is dangerous draws a clear distinction between what are chattels and what, by attachment or otherwise, from part of the realty. Why should it? Such a distinction does not justify itself, and it is not required by the immunities I have mentioned when one is not dealing with land-owners as such. In *Parry v. Smith*[3] the distinction is not referred to, and there, though the negligently fitted gas pipe seems to have made part of the realty dangerous, the injured servant of the occupier was

1 [1907] 2 K.B. 141.
2 [1932] A.C. 562.
3 (1879) 4 C.P.D. 325.
4 [1909] A.C. 640.
5 1954 S.C. 245.
6 Ibid. 251.

held entitled to recover from the gas-fitter for his negligence. So too, in *Dominion Natural Gas Co. Ltd. v. Collins*[1] where the appellant gas company negligently installed a gas regulator in a blacksmith shop, belonging to and occupied by a railway company, with the result that there was an explosion killing one and injuring another of the railwaymen. The appeal of the gas company from a finding of liability to the dependants and the injured workman was dismissed by the Judicial Committee. The apparatus in question, if one may judge from the description given by Lord Dunedin delivering the judgment of the Board, seems to have been as much a part of the realty as the boiler and burner in *Bottomley v. Bannister*[2], but the point was not taken and Lord Dunedin makes no mention of it.

Against all this, of course, must be set the fact, appearing in what I have already cited from the judgment of Scrutton L.J. in *Bottomley v. Bannister*[2], that that very learned judge apparently favoured a distinction between chattels and realty in this connection. But his dicta to that effect were obiter and I think it may well be that, like Greer L.J., he meant to confine the distinction to instances in which what I have called the settled immunities applied. He does not criticise *Parry v. Smith*[3] and his criticism of *Dominion Natural Gas Co. Ltd. v. Collins*[1] is limited to a question of causation. I should also refer at this point to what was said by another very distinguished judge in *Collis v. Selden*[4], one of the cases cited by Atkinson J. in *Otto v. Bolton and Norris*[5]. There, the plaintiff sought to recover for injuries sustained when a chandelier in a public house fell upon him. The defendant seems to have been sued as the person responsible for hanging the chandelier and there is nothing in the report to indicate that he was, or was alleged to be, the proprietor of the premises. The plaintiff in his declaration said that the defendant had hung the chandelier negligently and that the injuries received were due to this. On demurrer it was unanimously held by the Court of Common Pleas (Bovill C.J., Willes J. and Byles J.) that the declaration was bad as it did not disclose the nature of the duty alleged to have been breached. As a matter of strict pleading, this may have been a right decision, though at this distance I find some difficulty in following the reasoning of the court. But Willes J. also refers to the substantive law in terms which are relevant to the present issue. After saying that the chandelier was to be regarded as movable property he proceeds[6]: "It is

1 [1909] A.C. 640.
2 [1932] 1 K.B. 458.
3 (1879) 4 C.P.D. 325.
4 (1868) L.R. 3 C.P. 495.
5 [1936] 2 K.B. 46.
6 (1868) L.R. 3 C.P. at 497.

"simply the case of a person who, being employed to hang a chan-
"delier, hung it in a careless and negligent manner, it may be by a
"servant, under circumstances under which no knowledge could be
"imputed to the master. There would be no end of actions if we were
"to hold that a person having once done a piece of work carelessly,
"should, independently of honesty of purpose, be fixed with liability
"in this way by reason of bad materials or insufficient fastening.
"Take the case of a man building a house. His workpeople scamp
"the work: and five or six years afterwards a chimney-stack falls
"down through a high wind, and injures a person with whom he has
"no contract, to whom he owes no duty, and as against whom he
"cannot have been guilty of any fraud. To hold him liable to an
"action at the suit of the injured person would be going far beyond
"anything which has been decided in our law." As I have observed,
the defendant appears to have been sued simply as the person who
had hung the chandelier. His position, therefore, corresponds fairly
closely to that of the defendants in this case, and if the law is still as
stated by Willes J. some qualification of the doctrine of *Donoghue v. Stevenson*[1] would have to be made. But whatever may have been the
prevailing view in 1868, I am of opinion that this excerpt from the
judgment of Willes J. is no longer a correct statement of the law
relating to the duty to take reasonable care in the fitting or con-
struction of things that pertain to the realty. I think it must be
regarded as having fallen with *Malone v. Laskey*[2] and as being now
ineffective to establish any exception to or qualification of the
doctrine of *Donoghue v. Stevenson*[1]. If I may hark back to something
I observed earlier, I think what Willes J. said may be described as
belonging to that part of the law which, with its narrow categories of
things dangerous in themselves and things dangerous by negligent
construction, that doctrine overran and submerged. In *Billings v. Riden*[3] the House of Lords held that contractors reconstructing the
approach to a house owed a duty to those who might be expected
lawfully to visit the house to take such care as, in all the circum-
stances, was reasonable to ensure that they were not exposed to
danger. The report of that decision does not refer to *Donoghue v. Stevenson*[1], and its facts are far from those of the present case. But as
a decision it seems to me to substantiate the conclusion I have just
expressed. It broke away from the view that a duty to take care in
relation to dangers on landed property must be founded on occupancy
or contract, with the result, as I see it, that such dangers can no

[1] [1932] A.C. 562.
[2] [1907] 2 K.B. 141.
[3] [1958] A.C. 240.

longer be excluded from the scope of *Donoghue v. Stevenson*[1].

For these reasons I would answer question (2) by saying that the doctrine of *Donoghue v. Stevenson*[1] is capable of applying to defects in house property other than those defects in respect of which landowners, entitled to enjoy the immunities I have already described, are sued as such. That, however, is not enough to harness the doctrine to the facts of this case. The existence of a duty to take care must be established. Were the parties here in the "proximity" which would impose that duty under that doctrine upon the defendants?

This important aspect of the matter comes within the scope of question (3) to which I now turn. Assuming, as I would hold, that the doctrine of *Donoghue v. Stevenson*[1] can apply to defective houses as well as defective chattels, is it qualified in some manner which makes it inapplicable to this case? The defendants say that it is. They say that the decision itself shows that the relationship between the parties here was not such as to generate a duty to take care. I have said earlier that the case falls, prima facie, within the general words used by Lord Atkin, and I do not understand the defendants to raise any serious issue as to that. What they submit is that the application of the broad principle Lord Atkin enunciated depends on more specific tests.

First of all, they say that on the evidence the criterion of liability mentioned in the penultimate paragraph of Lord Atkin's opinion defeats the present claim. Lord Atkin there accepts as well founded the proposition that a manufacturer owes a duty to the consumer of his products to take reasonable care if, with knowledge of the injurious consequences of the absence of such care, he sells the products in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him "*with no "reasonable possibility of intermediate examination*....." Here, the argument proceeds, this condition is not satisfied as no one could say that there was not a reasonable possibility of intermediate examination between the laying of the defective floor and the letting of the house. The evidence, indeed, shows that there was an inspection of the house before it was taken over by the Housing Trust from the defendants, and I am content to assume that the defendants and their workmen must, during the course of the construction, have anticipated that this inspection would take place.

Tucker J. (as he then was) had to consider this dictum of Lord

[1] [1932] A.C. 562.

Atkin in *Herschtal v. Stewart and Arden, Ltd.*[1] and he came to the conclusion that the mere existence of a "reasonable possibility of "intermediate examination" was not sufficient to prevent the proximate relationship on which liability in negligence rested. Two passages from this valuable judgment may be quoted. First, Tucker J. says[2]: ". . . . the mere existence of the opportunity for examination is "not sufficient to break the chain or destroy the proximate relation-"ship. I think that *Donoghue v. Stevenson*[3] ought not to be so limited "as to be confined only to the precise words used by Lord Atkin in "the concluding part of his speech, which I have already pointed out "were not necessary for the decision in that case. I think that one has "to look at the whole basis of the judgment and apply it to the facts." And then he adds[4]: "Accordingly, I hold that the defendants are "liable in the present case on the basis that they were the plaintiff's "neighbours in law and were supplying a dangerous article for his "user in circumstances in which they did not and could not have "reasonably anticipated that there would be any such intermediate "examination as would be likely to reveal a defect such as existed in "the article."

I respectfully agree with the views thus expressed by Tucker J. Lord Atkin's specific criterion relates to that part of his general statement which defines neighbours in law and reads[5]: ". . . . persons "who are so closely and directly affected by my act that I ought "reasonably to have them in contemplation as being so affected. . . . ." The mere possibility of examination does not necessarily bear on this description of the proximity which spells a duty to take care. What does bear on it is whether a reasonable person would anticipate an examination before use which would avoid injury to the user. At almost every turn in the modern workaday world people have to depend for their safety on the care and skill of others in circumstances which make an intermediate investigation, however possible in theory, quite impracticable in fact.

Thus regarded, what I may call the intermediate examination test may be capable of settling, over a wide field, whether or not a duty to take reasonable care exists. But I do not think the majority in *Donoghue v. Stevenson*[3] intended to lay down a test of this nature as the only test of proximity in every case in which the broad doctrine of that authority is invoked. Circumstances vary so greatly that cases

1 [1940] 1 K.B. 155.
2 Ibid. 170.
3 [1932] A.C. 562.
4 [1940] 1 K.B. at 172.
5 [1932] A.C. at 580.

may well arise in which the existence of the duty to take care can be determined simply by applying, without further refinement, Lord Atkin's definition of a neighbour in law. If I may say so, that would have been a more satisfactory way of dealing with the question of proximity in *Davis v. Foots*[1] than the test actually applied in that case, though the landlord relationship which existed there would still have prevailed. I need not, however, pursue this subject. Taking the specific test, as interpreted by Tucker J., I ask—would a reasonable workman have anticipated that the defective floor board in this case would have been revealed by an inspection before harm was done to those who would use the house he was helping to build? As I have already said, he would reasonably have anticipated an inspection before such user; but would he reasonably have anticipated that such inspection would expose the danger and so avoid its consequences? To my mind this question should receive a negative answer as the evidence now stands. As observed earlier, the danger was caused by a defect which was concealed, and an inspection which fell short of taking the plug out for examination would not have uncovered the real peril. I do not think an inspection of this searching type was or could reasonably have been anticipated. Presumably, the plug was inserted in the hope that it would get by, and it did. Mr. Kelly's testimony appears to have been that he would not say that a careful inspection would have disclosed the plug, and it looks as though the chances of this small plug being noticed on inspection were not high. But the best approach, in applying the intermediate examination test, is from the point of view of the workman. He had laid a floor which was dangerous and which he knew, or ought to have known, was dangerous because of his bad workmanship, but which, in fact, would not show the danger on a superficial examination. In such circumstances I can see no ground for thinking that a reasonable person would have anticipated that someone would have discovered the defective construction before it did harm. Accordingly, whether one applies the intermediate examination test or goes back to Lord Atkin's general definition, the relationship between the parties here seems to remain proximate enough to raise a duty of care.

Another point on this question of proximity must be mentioned. Mr. Lowry, for the defendants, submitted that if a builder builds a defective house the relationship between him and a subsequent user ceases to be sufficiently proximate to raise a duty of care *after* the

[1] [1940] 1 K.B. 116.

house has been let or sold. No doubt in some cases a series of intervening events may so attenuate the relationship that it ceases to be proximate as a matter of remoteness. I cannot see, however, that remoteness comes into the present case, with the plaintiff the wife of the first tenant. Nor can I see that the mere fact of alienation holds any quality which should break the chain and dissipate the duty. It is the event which ordinarily brings about the user that the builder has worked for and must have anticipated.

I am therefore of opinion and hold that at the conclusion of the plaintiff's evidence the relationship between the parties had been shown to be sufficiently proximate for the purposes of the doctrine in *Donoghue v. Stevenson*[1]. Before answering question (3), however, there is, I think, one further inquiry which the breadth of that doctrine invites. Will its extension to building contractors cause or lead to some mischief which would justify the rejection of such an extension? The attitude that any enlargement of the field of tortious liability is always to be regarded as a step in the right direction is not one to be commended. Some gap between morality and law is inevitable and, if the gap is not too large, may be for the benefit of both codes. On the other hand, the changes to be expected in a progressive society call, from time to time, for such adjustments in the domain of legal responsibility as will promote justice and fair dealing. Those are terms which may mean different things in different epochs, but from the point of view of what is generally regarded as just and fair today I see no reason why a responsibility similar to that of the manufacturers and repairers of chattels should not fall upon the builders of houses, or why, if it does so fall, harm to trade or commerce or some other important facet of the life of the community should be apprehended. The immunities of the land-owner seem to me to strengthen rather than weaken these conclusions.

For these reasons, I would answer question (3) in the negative. I am, therefore, of opinion that the plaintiff should not have been nonsuited, and that this appeal should be allowed with costs, the plaintiff to have her costs of the first trial if she succeeds in the action.

BLACK L.J. The facts upon which the appeal in this case is sought to be based are simple and can be stated quite shortly.

The appellant resided with her husband in a house on the Rathcoole Estate which had been built by the respondents for the Northern Ireland Housing Trust. The house was finally accepted by the

[1] [1932] A.C. 562.

architect for the Trust on December 4, 1956, and the appellant's husband became the first tenant of the house, his tenancy commencing on December 10, 1956. The appellant's claim against the respondents was for injuries which she complained she had sustained on the night of June 25, 1958. She stated that they (the appellant and her husband) had brought linoleum to the house and had put it temporarily on the floor of one of the bedrooms but that on June 25, 1958, the room had been redecorated and they were putting down new linoleum. The old linoleum had been taken off and on June 25 there was no linoleum on the floor of this bedroom. The appellant alleges that when she was moving about in the room her right heel went through the floor with the result that she fell and her back hit the iron bed. She says that her heel stuck in the hole in the floor and her right knee seemed to get twisted. The accident was the more serious as according to the medical evidence the appellant had previously suffered from a fairly severe degree of rheumatoid arthritis and this condition was considerably worsened by the fall. It was in evidence that after the accident it was found that a small rectangular piece of wood measuring $1\frac{3}{4}$ inches by $1\frac{1}{4}$ inches had for some reason been cut out of the flooring and the appellant's husband produced a small rectangular piece of wood the size of this hole in the floor which he says he found lying on the ceiling between the joists when a portion of floor board was taken up later to effect the necessary repair. This piece of wood was referred to in evidence as a "plug" and the inference which was suggested was that it had been inserted to plug the hole in the floor. So far as the evidence went the reason why such a hole should have been cut in one of the boards which formed the flooring is a complete mystery. Mr. Kelly, the architect called on behalf of the appellant, said that he could see no reason for the hole. Nor is it any less a mystery why the hole should have been repaired by the insertion of the so-called plug. Mr. Kelly expressed the opinion that it was an amateur job and that it would have been easier to repair the hole properly than in the way it was done. The job, according to his view, was not done in a workmanlike manner. The hole, he said, had been narrowed down to take the plug but it angled with the grain and would, therefore, more readily give way if any pressure was put on it. According to Mr. Kelly it was unworkmanlike to angle it with the grain.

At the conclusion of the appellant's evidence counsel for the respondents applied for a direction on the grounds (1) that there was no evidence leading to the probability that the hole was made by the respondents; (2) that it was hard to say that the appellant had pro-

duced evidence that it was foreseeable that someone might be injured by such a defect; and (3) that when a builder has constructed a house to the order of the Housing Trust and it is later let to a tenant the builder does not owe any duty in tort to the tenant's wife or indeed to the tenant. The learned trial judge acceded to this application for a direction on the ground that the respondents owed no duty in tort to the appellant.

In deciding whether defendants are entitled to a direction or whether on the other hand the plaintiff is entitled to have the case allowed to go to the jury, the plaintiff's evidence must, of course, for this purpose be accepted pro veritate, if one may take the liberty of borrowing a phrase used in the Scottish cases.

With regard to the first of the three grounds relied upon by the respondents in their application for a direction, I gather from the appellant's evidence that the bedroom floor had been covered with the old linoleum from shortly after the family had come to live in the house and the appellant's husband stated that he did not make the hole nor did anyone else to his knowledge. I think that this evidence, though somewhat meagre, was sufficient to entitle the appellant to have the question submitted to the jury whether the respondents were responsible for the hole and the plug.

The second of the grounds put forward in the application for a direction at the trial was not relied on by the respondents in this court. I take it that it was recognized that the question whether it was foreseeable that someone might be injured by such a defect in the floor was eminently a question for the jury.

The real contest on the appeal was upon the question of law raised in the third ground of the respondent's application. After studying with what care I can the various reported decisions which are relied upon by the parties I confess that I still find the problem one of very considerable difficulty.

Counsel for the appellant based her case upon the principle enunciated in the oft cited passage in Lord Atkin's speech in *Donoghue v. Stevenson*[1]: "You must take reasonable care to avoid "acts or omissions which you can reasonably foresee would be likely "to injure your neighbour. Who, then, in law is my neighbour? The "answer seems to be—persons who are so closely and directly affected "by my act that I ought reasonably to have them in contemplation as "being so affected when I am directing my mind to the acts or "omissions which are called in question." It was accordingly held by

[1] [1932] A.C. 562, 580.

the majority of the House of Lords in *Donoghue v. Stevenson*[1] that where a manufacturer of foodstuffs puts up an article of food in a container which is not intended to be opened until it comes into the hands of the actual consumer and where there is no reasonable possibility of inspection by any intermediate handler of the goods between the manufacturer and the consumer, the manufacturer has brought himself into direct relationship with the consumer with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer (per Lord Atkin[2]: Lord Thankerton[3]). *Donoghue v. Stevenson*[1] was the case of an article of food but Lord Atkin clearly indicated that he did not intend that the principle which he had enunciated should be confined to articles of food. He says[4]: "There are other instances than of articles of food and drink where "goods are sold intended to be used immediately by the consumer, "such as many forms of goods sold for cleaning purposes, where the "same liability must exist. The doctrine supported by the decision "below would not only deny a remedy to the consumer who was "injured by consuming bottled beer or chocolates poisoned by the "negligence of the manufacturer, but also to the user of what should "be a harmless proprietary medicine, an ointment, a soap, a cleaning "fluid or cleaning powder. I confine myself to articles of common "household use, where every one, including the manufacturer, knows "that the articles will be used by other persons than the actual "ultimate purchaser—namely, by members of his family and his "servants, and in some cases his guests. I do not think so ill of our "jurisprudence as to suppose that its principles are so remote from "the ordinary needs of civilized society and the ordinary claims it "makes upon its members as to deny a legal remedy where there is so "obviously a social wrong."

In accordance with these observations of Lord Atkin the principle of *Donoghue v. Stevenson*[1] has been applied in subsequent cases not merely to consumers of foodstuffs but to users of a wide variety of articles, e.g. underwear (*Grant v. Australian Knitting Mills Ltd.*[5]), hair dye (*Parker v. Oloxo Ltd.*[6], *Watson v. Buckley, Obsorne, Garrett & Co. Ltd. and Wyrovoys Products Ltd.*[7]), and motor vehicles (*Malfroot v. Noxal Ltd.*[8]: *Stennett v. Hancock and Peters*[9]: *Herschtal v. Stewart & Ardern Ltd.*[10]). It has been applied too where the negligence alleged

1 [1932] A.C. 562.
2 Ibid. 582-3.
3 Ibid. 603.
4 Ibid. 583.
5 [1936] A.C. 85.
6 [1937] 3 All E.R. 524.
7 [1940] 1 All E.R. 174.
8 (1935) 51 T.L.R. 551.
9 [1939] 2 All E.R. 578.
10 [1940] 1 K.B. 155.

is not that of a manufacturer but that of a repairer (*Stennett v. Hancock and Peters*[1]; *Haseldine v. Daw & Son Ltd.*[2]). In *Donoghue v. Stevenson*[3] Lord Atkin spoke of the principle applying where the manufacturer sells his products in such a form as to show that he intends them to reach the consumer in the form in which they left him with no reasonable possibility of intermediate examination. This question of whether the existence of a possibility of intermediate examination should in itself be sufficient to relieve the defendant of liability has been several times considered in later cases and it may now be taken as established since *Grant v. Australian Knitting Mills Ltd.*[4] that the true test is whether the defendant should reasonably have contemplated that the defective article might be put into use without an examination either by the plaintiff or by some intermediary which would have disclosed the defect (*Herschtal v. Stewart & Ardern Ltd.* per Tucker J.[5]: *Haseldine v. Daw & Son Ltd.* per Goddard L.J.[6]).

While there can now be no doubt but that Lord Atkin's principle in *Donoghue v. Stevenson*[7] applies as between the manufacturer or repairer on the one hand and the consumer or user on the other hand in the case of chattels, the question whether it has any application to houses or realty has caused the courts considerable difficulty. In *Malone v. Laskey*[8], the owners of certain premises let to tenants under agreements which did not impose upon the owners any liability to do repairs nevertheless repaired a lavatory cistern in the premises but did it so negligently that some time later it fell upon the wife of an employee of a subtenant of the premises and injured her. It was held by English Court of Appeal that the injured person had no cause of action against the owners of the premises. This decision was, of course, prior to *Donoghue v. Stevenson*[7]. But in the subsequent case of *Ball v. London County Council*[9] the Court of Appeal notwithstanding *Donoghue v. Stevenson*[7] held themselves bound by and followed *Malone v. Laskey*[8]. The Scottish courts, however, took a different view (*Mooney v. Lanarkshire County Council*[10]) and now, having regard to the clear expressions of opinion in the speeches in the House of Lords in the recent case of *A. C. Billings & Sons Ltd. v. Riden*[11], *Malone v. Laskey*[8] must be treated as having been definitely disapproved and overruled by the House of Lords as has also *Ball v.*

1 [1939] 2 All E.R. 578.
2 [1941] 2 K.B. 343.
3 [1932] A.C. at 599.
4 [1936] A.C. 85.
5 [1940] 1 K.B. at 162 et seq.
6 [1941] 2 K.B. at 376-7.
7 [1932] A.C. 562.
8 [1907] 2 K.B. 141.
9 [1949] 2 K.B. 159.
10 1954 S.C. 245.
11 [1958] A.C. 240.

London County Council[1] in so far as it was based on *Malone v. Laskey*[2]. Shortly after the decision in *Billings v. Riden*[3] the legal position was stated by Lord Denning in *Miller v. South of Scotland Electricity Board*[4] in the following terms: "The pursuer.... sues the "Electricity Board for negligence in doing work on the land. He sues "them on the ground that a person executing works on premises is "under a general duty to use reasonable care for the safety of those "whom he may reasonably expect to be affected by his work. This "duty has recently been affirmed by this House in *Billings v. Riden*[3]. "It is a duty which rests both on a contractor who does work on the "land and also on the occupier if he himself does it—but he is then "sued, not as occupier, but as the doer of the work..... We are not "here concerned with the obligations of occupiers of land—as "occupiers—or with the special rules applicable to trespassers there- "on. We are concerned with the duty of care that is owed by a person "doing work—or anything else—on land: and that duty is today best "found by resort to the general principle enunciated by Lord Atkin "in *Donoghue v. Stevenson*[5]. Such a person—be he occupier, con- "tractor or anyone else—owes a duty to all persons who are so "closely and directly affected by his work that he ought reasonably to "have them in contemplation when he is directing his mind to the "task."

This legal position that a person executing work on property falls within the ambit of Lord Atkin's principle in *Donoghue v. Stevenson*[5] is illustrated by the decision of the English Court of Appeal in *Haseldine v. Daw & Son Ltd.*[6] where the principle was applied in the case of the repairs of a lift in a block of flats.

But it is said on behalf of the respondents that even if the principle of *Donoghue v. Stevenson*[1] can be applicable as against a builder or repairer who has done work in the construction or repair of a house, yet in the present case the appellant is faced with the obstacle that the building owners' architect or their clerk of works had inspected and presumably passed the house upon its completion and that the building owners had accepted it. No doubt it may be that under the contract between the building owners (the Housing Trust) and the respondents the latter may be free from any liability to the Trust for defects of workmanship once the house has been passed and accepted by the Trust. But *Donoghue v. Stevenson*[5] and the numerous cases which have followed it have definitely established that the liability of

1 [1949] 2 K.B. 159.
2 [1907] 2 K.B. 141.
3 [1958] A.C. 240.
4 1958 S.C. (H.L.) 20, 37.
5 [1932] A.C. 562.
6 [1941] 2 K.B. 343.

the defendant to the plaintiff in cases where the principle of *Donoghue v. Stevenson*[1] applies is a liability in tort and is quite independent of and unaffected by any contractual relationship between the defendant and a third party. So that in a case such as the present the liability of the builders to an injured party would still exist even though they had become entirely discharged from all liability to the building owner. If the "neighbour" principle in *Donoghue v. Stevenson*[1] is applicable to the builder or repairer of a dwelling-house, to whom is the duty owed? According to Lord Atkin[2], in words which have since been repeatedly adopted and followed, it is owed to "persons who are so "closely and directly affected by my act that I ought reasonably to "have them in contemplation as being so affected when I am directing "my mind to the acts or omissions which are called in question." The builder of a dwelling-house must surely have in contemplation that the floors in the house will be used by all who have occasion to come into the house, be it the building owner himself or his tenants or subtenants or members of their families or their servants or their guests, and must reasonably foresee that any such persons may be directly affected and may sustain injury as a consequence of defects in his workmanship. It is, however, to be borne in mind that the duty imposed by *Donoghue v. Stevenson*[1], is in the words of Lord Atkin[2], a duty "to take reasonable care to avoid acts or omissions which you "can *reasonably foresee* would be likely to injure your neighbour." A defendant is not to be held responsible for all possible consequences of his acts or omissions. In order to fix a defendant with liability the fact that injury is likely to result from his acts or omissions must be such as a reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts or omissions would have foreseen. This is amply established by such authorities as *Glasgow Corporation v. Muir*[3] and *Bolton v. Stone*[4]. Accordingly, if the present case is held to fall within the principle of *Donoghue v. Stevenson*[1] the question will have to be considered whether (on the assumption that the respondents were responsible for the defect in the floor) such a consequence as the injury to the appellant could reasonably have been anticipated by a reasonable man as likely to result from the particular defect. This, as pointed out by Lord Thankerton in *Glasgow Corporation v. Muir*[5], is essentially a jury question. Moreover, in applying the principle of *Donoghue v. Stevenson*[1] one must not overlook the "intermediate examination"

1 [1932] A.C. 562.
2 Ibid. 580.
3 [1943] A.C. 448.
4 [1951] A.C. 850.
5 [1943] A.C. at 454.

element of the principle. In the present case it appears that the house would be inspected by the Housing Trust's clerk of works before its final acceptance by the Trust. If the defect in the floor then existed the clerk of works may not have noticed it or may not have appreciated it. But in order to determine the builder's responsibility, the test is not whether the defect was one which would not be discovered by such examination as the building owner or the tenant or someone else might chance to make. The question is whether the defect was one which would not have been discoverable on such examination as the builder should reasonably have contemplated. Whether the defect was or was not of such a nature is a question of fact and on the facts as they appeared at the end of the appellant's case it is at any rate possible that the jury might have decided this question of fact in her favour.

The foregoing considerations suggest that the appellant was entitled to have her case left to the jury. The respondents, however, rely on a series of authorities which they contend establish that in circumstances such as those of the present case the plaintiff was not so entitled.

It will be convenient perhaps to commence with *Cavalier v. Pope*[1]. In that case the landlord of a dilapidated house contracted with the tenant to repair it but failed to do so. The tenant's wife who lived in the house and was well aware of the danger was injured by an accident caused by the want of repair. The House of Lords affirming the decision of the Court of Appeal held that the landlord was not liable to the tenant's wife either in contract or in tort. The decisions of the Court of Appeal and of the House of Lords were not based on any ground of knowledge of the danger by the wife or on the basis that the defects were discoverable by inspection but simply on the grounds that according to a well established principle of English law as exemplified by such authorities as *Robbins v. Jones*[2] and *Lane v. Cox*[3] a landlord who has let a house in a dangerous state is not, fraud apart, liable to the tenant's household or to his customers or guests for accidents happening during the tenancy. *Cavalier v. Pope*[1] was simply a case dealing with a landlord's freedom from responsibility and in *Donoghue v. Stevenson*[4] was dismissed by Lord Macmillan[5] as being in a different chapter of the law. In *Greene v. Chelsea Borough Council*[6] the English Court of Appeal have held

1 [1906] A.C. 428.
2 (1863) 15 C.B. (N.S.) 221.
3 [1897] 1 Q.B. 415.
4 [1932] A.C. 562.
5 Ibid. 609.
6 [1954] 2 Q.B. 127.

that the effect of *Cavalier v. Pope*[1] is confined to the case where the defendant sought to be made responsible is a landlord strictly so called and that the decision could not be applied in favour of a local authority who had allowed the plaintiff, her husband and her family to occupy rooms in a requisitioned house in consideration of a weekly payment. The defendants in that case had sought to rely on the principle of *Cavalier v. Pope*[1]. At the commencement of his judgment Denning L.J. says[2]: "During the nineteenth century there "was a doctrine current in the law which I will call the 'privity-of-" 'contract' doctrine. In those days it was thought that if the defend- "ant became connected with the matter because of a contract he had "made, then his obligations were to be measured by the contract and "nothing else. He owed, it was said, no duty of care to anyone who "was not a party to the contract. This doctrine received its quietus by "the decision of the House of Lords in *Donoghue v. Stevenson*[3], but it "has been asserted again before us today. We must, I think, firmly "resist the revival of this out-worn fallacy. *Cavalier v. Pope*[1] is a relic "of it which must be kept in a close confinement. This is not a land- "lord and tenant case. It is a requisitioning case."

In the present case before this court the respondents who are sued for negligence are not landlords and, accordingly, cannot rely on the immunity conferred upon landlords according to *Lane v. Cox*[4] and *Cavalier v. Pope*[1]. I think that counsel for the respondents recognised this and were not disposed to lean their argument upon such decisions.

The respondents relied strongly, however, on the decision of the English Court of Appeal in *Bottomley v. Bannister*[5]. In that case the defendants were a firm of builders who had erected a dwelling-house upon land of which they were the owners. They contracted to sell the house to a purchaser and pending completion of the contract allowed the purchaser into possession as tenant at will. A boiler heated by a Bunsen gas burner had been installed in the house but no flues had been attached to carry gas or fumes from the burner to the outer air. This installation was held by the court to have become part of the realty. About a month after the purchaser had gone into occupation he and his wife were found dead in the bathroom poisoned by carbon monoxide gas. The personal representatives of the purchaser and his wife sued the builders under the Fatal Accidents Acts. It was the business of the gas company and not that of the builders to regulate

1 [1906] A.C. 428.
2 [1954] 2 Q.B. at 138.
3 [1932] A.C. 562.
4 [1897] 1 Q.B. 415.
[1932] 1 K.B. 458.

the flow of gas to the burner. The gas company's inspector had set the regulator to regulate this flow at 45 cubic feet per hour which was held to be perfectly safe but after the death of the purchaser and his wife the regulator was found to have been altered to 75 cubic feet per hour which was dangerous and the effect of the evidence, according to Scrutton L.J., was that this alteration was the act of the occupier and his wife. The Court of Appeal held the builders not liable. Scrutton L.J. sums up his conclusion[1]: "My view of the law is that "the installation being part of the realty, the cases as to chattels do "not apply; and that if the installation is treated as a chattel it is a "chattel handed to a competent person to regulate on behalf of the "tenant-occupier, and the vendor-landlord is not liable for what hap-"pens afterwards." As regards the first part of these observations, it is to be noted that *Bottomley v. Bannister*[2] was decided by the Court of Appeal more than six months before *Donoghue v. Stevenson*[3] was decided by the House of Lords and that the weight of modern authority as shown by the decision in *Haseldine v. Daw & Son Ltd.*[4], the disapproval of *Malone v. Laskey*[5] in *Billings v. Riden*[6] and the passage which I have quoted from Lord Denning's speech in *Miller v. South of Scotland Electricity Board*[7] is that the principle of *Donoghue v. Stevenson*[3] applies to work done on real property. The other members of the Court in *Bottomley v. Bannister*[2] founded their judgments upon *Cavalier v. Pope*[8] and *Lane v. Cox*[9]. Greer L.J. says[10]: "The other cases are those which deal with the liability of a "vendor of some chattel, which is dangerous in itself, who gives no "warning to the purchaser which might be passed on to the user of "the article. After *Cavalier v. Pope*[8] in the House of Lords and *Lane v. Cox*[9] I cannot hold that these decisions apply to cases between "landlord and tenant, or to cases between the landlord and persons "using the premises by licence of the tenant. The result is unsatis-"factory, because in the present case, if the landlord instead of doing "the work himself before he sold the house, had done it afterwards as "a contractor to Mr. Bottomley, he would have been liable if there "were sufficient evidence that it was negligence on his part to have "installed the Halliday boiler without a flue." Similarly, Romer L.J. says[11]: "Assuming therefore that the findings of the jury are to be "accepted, the case is one in which, by reason of the dangerous

1 [1932] 1 K.B. at 474.
2 Ibid. 458.
3 [1932] A.C. 562.
4 [1941] 2 K.B. 343.
5 [1907] 2 K.B. 141.
6 [1958] A.C. 240.
7 1958 S.C. (H.L.) 20, 37.
8 [1906] A.C. 428.
9 [1897] 1 Q.B. 415.
10 [1932] 1 K.B. at 477-8.
11 [1932] 1 K.B. at 483-4.

"condition of premises that were let unfurnished, the tenant and his "wife were fatally injured. It is, however, settled law that in such a "case the landlord cannot be held liable in the absence of fraud on "his part: see *Cavalier v. Pope*[1]; *Lane v. Cox*[2]." My comment on the applicability of these dicta to the present case of course is that in the present case the respondents are not landlords but contractors. They cannot claim the immunity with which, according to *Lane v. Cox*[2] and *Cavalier v. Pope*[1], the law clothes landlords. As contractors they are under the doctrine of *Donoghue v. Stevenson*[3] subject to a duty to use reasonable care for the safety of those whom they may reasonably expect to be affected by their work. And it is irrelevant to this responsibility that between them and the persons whom they may expect to be affected by their work there may be interposed sundry contractual relationships to which the contractors are not parties.

The next case relied upon by the respondents was *Otto v. Bolton and Norris*[4]. In that case the defendants were the owners of a building estate which they were developing by the erection and sale of dwelling-houses. A Miss Otto agreed by contract in writing to buy one of the houses from the defendants. It was found by Atkinson J. that Miss Otto entered into this contract on the basis of an assurance amounting to a warranty that the house was well built. Some of the ceilings in the bedrooms, however, were very badly constructed and were dangerous to persons who slept in the house. A number of falls of these ceilings took place causing a certain amount of damage and also injuring a second plaintiff, Mrs. Otto. Atkinson J. held Miss Otto entitled to recover damages against the builders on their warranty but held that Mrs. Otto was not entitled to recover on foot of her personal injuries. On a review of the authorities he based his decision on two grounds, first that the doctrine of *Donoghue v. Stevenson*[3] applies only to chattels and not to realty. In this he relied on such decisions as *Collis v. Selden*[5], *Malone v. Laskey*[6] and most especially *Bottomley v. Bannister*[7] and held that the principle of this last mentioned decision had not been affected by *Donoghue v. Stevenson*[3]. As I have endeavoured to show, it is inconsistent with more recent expositions of the law in the House of Lords to contend that the principle enunciated by Lord Atkin in *Donoghue v. Stevenson*[3] is not applicable to work executed on house property. In the second place Atkinson J. held that even if the doctrine of *Donoghue v.*

1 [1906] A.C. 428.
2 [1897] 1 Q.B. 415.
3 [1932] A.C. 562.
4 [1936] 2 K.B. 46.
5 (1868) L.R. 3. C.P. 495.
6 [1907] 2 K.B. 141.
7 [1932] 1 K.B. 458.

Stevenson[1] applied to work executed on house property it was not applicable on the facts of the case to fix liability upon the defendants for the injury to Mrs. Otto because the defect was a patent one which would appear on any examination which could have been anticipated. In his judgment Atkinson J. says in regard to this point[2]: "Now even "if this principle does apply to buildings which are sold by the man "who has built them, it seems to me that it would still be impossible to "hold that there was the necessary proximity between the defendants "and Mrs. Otto. There was nothing to prevent examination of the "house on the intermediate purchase. Indeed, the well known "absence of any duty in respect of the sale of a house makes exami- "nation usual and likely. The defect was not hidden or latent; the "blobs were there plainly to be seen and would have put anybody, "making a proper inspection, on his guard. In fact there was an "examination, although an inadequate one, by the person who made a "report on September 21 or 22 to Miss Otto's solicitors." It appears to me that this second line of reasoning was quite in accord with *Donoghue v. Stevenson*[1] and was on the facts of the case sufficient to justify Atkinson J's. rejection of Mrs. Otto's claim.

The next relevant case is *Davis v. Foots*[3], a decision of the English Court of Appeal. This was a pure landlord and tenant case. The defendants who were the owners and occupiers of a flat agreed to let it to the plaintiff and her prospective husband. There was in one of the grates a gas fire which was the property of the defendants. The plaintiff informed Mrs. Foots that she and her prospective husband would not require this gas fire and did not want it. Mrs. Foots then said she would have it taken out. A son of the defendants accordingly removed the gas fire from its fixture in the grate. At that time the gas was turned off at the meter. In removing the gas fire the defendants' son did not leave any tap on the pipe which had led to the gas fire or any other means of stopping the escape of gas. The result was that if anyone turned on the gas at the meter there would be an escape of gas from the pipe into the room. The gas company's representative turned on the gas at the meter during the morning of the day on which the plaintiff and her husband were married so that gas must have been escaping during the rest of the day from this disconnected pipe. The plaintiff and her husband went to bed that night in ignorance of the fact that the gas had been pouring into the bedroom. The plaintiff said in evidence that there was a smell in the room but she had no experience of gas and did not recognise the smell. The result

1 [1932] A.C. 562.
2 [1936] 2 K.B. 46, 58.
3 [1940] 1 K.B. 116.

was that the plaintiff and her husband became unconscious and remained unconscious until they were found by relatives. The husband died of gas poisoning and the plaintiff became very ill but eventually recovered. The trial judge found in the plaintiff's favour and awarded her damages. The Court of Appeal, however, reversed this decision. MacKinnon L.J. based his decision on the simple principle that in English law, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant for defects in the house rendering it dangerous even if he has constructed the defects himself or is aware of their existence, and du Parcq L.J. held that a conclusive reason against applying the principle in *Donoghue v. Stevenson*[1] was that the defect was not a latent one and that there was ample opportunity after the plaintiff and her husband had received the keys of the flat for such an examination of the premises as would have disclosed the defect. It is clear that such a decision as this in a case as between tenant and landlord does not govern a case such as the present where the respondents are not the landlords but the builders of the house.

The last case relied upon by the respondents was *Travers v. Gloucester Corporation*[2]. In that case the defendants had installed in a dwelling-house belonging to them and let to a tenant a geyser which was unsatisfactory and dangerous inasmuch as the vent pipe from it terminated under the eaves of the house instead of rising above them so as to ensure that fumes did not descend into the bathroom. As a result a lodger in the house died from accidentally inhaling carbon monoxide fumes emitted from the geyser while he was taking a bath. Lewis J. held that the Corporation was not liable. I cannot see how he could have done otherwise having regard to the decision of the House of Lords in *Cavalier v. Pope*[3]. He also considered at length the decision in *Donoghue v. Stevenson*[1] and held that in the case before him there was ample opportunity of inspection.

After fully considering the English authorities I do not see that any of them should preclude us from holding that the respondents as builders of the house were under a liability on the lines of *Donoghue v. Stevenson*[1] to those who would eventually occupy the house and to their servants and guests in respect of any defects in the construction of the house which would not have been discoverable on such examination as the builders would reasonably have contemplated, and I am fortified in this conclusion by what has been said by

1 [1932] A.C. 562.
2 [1947] K.B. 71.
3 [1906] A.C. 428.

members of the highest tribunal in the recent cases of *Billings v. Riden*[1] and *Miller v. South of Scotland Electricity Board*[2]. On the evidence adduced by the appellant I think it is possible that a jury might take the view that the defect which was alleged to have been the cause of the appellant's injuries was such as might not have been discoverable on such examination as would reasonably have been anticipated and, accordingly, I agree that in the present case the appellant was entitled to have her case allowed to go to the jury and that this court should accede to her application for a new trial.

SHEIL J. I agree with the conclusions at which my Lords have arrived, and that there should be a new trial.

Appeal allowed.
New trial ordered.

Solicitor for the plaintiff and appellant: *F. Crilly.*
Solicitor for the defendant and respondent: *H. J. Catchpole.*

J.P.

[1] [1958] A.C. 240.

[2] 1958 S.C. (H.L.) 20.

IN RE CALVERT[1]

Bankruptcy—Administration of insolvent estate—Fiduciary relationship between stockbroker and client—Proceeds of sale of securities standing to credit of deceased stockbroker—Whether proof of debt on behalf of cestui que trust constitutes election—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 262.

Proof of debt on behalf of a person entitled to a fund which is impressed with a trust and which is traceable in the estate of a deceased insolvent does not constitute an election within the meaning of section 262 of the Irish Bankrupt and Insolvent Act, 1857. In the administration in bankruptcy of an insolvent estate, where part of a trust fund is traceable and part is not, a person claiming the fund, notwithstanding that he has proved the whole amount as a debt, will be allowed to amend his proof so as to exclude that part of the fund which is traceable.

MOTION for leave to amend a proof of debt in the administration in bankruptcy of an insolvent estate.

In the year preceding his death the deceased insolvent, a stockbroker, sold certain securities for the applicant, the Belfast Bank Executor and Trustee Company Limited. The net proceeds of the sale of the securities, which formed part of an estate of which the applicant was executor, were £4,759 4s. 9d. At the time of the deceased insolvent's death there was £4,239 8s. 9d. of this sum standing to his credit in his bank. In the administration in bankruptcy of the deceased's estate the applicant proved the whole amount of £4,759 4s. 9d. as if it was a debt, and then sought to amend the proof so as to exclude the amount which was traceable.

Jones Q.C. and *Hutton* for the applicant. There is an abundance of authority to support the view that the stockbroker was acting in a fiduciary capacity and that the proceeds of the sale of the securities were held by him on an implied trust: *Hancock v. Smith*[2]; *In re Strachan*[3]. The traceable sum of £4,239 8s. 9d. was impressed with a trust in favour of the estate for which the applicant was acting. Property of which a bankrupt was merely a trustee does not vest in the Official Assignee: see Robb on Bankruptcy, p. 142, where the author states that notwithstanding the absence of express statutory provision to this effect in Ireland, the courts here have always held that trust property does not pass to the assignee in bankruptcy. Lest it should be argued that money paid under a mistake of law is not

[1] In the Queen's Bench Division (Bankruptcy) before McVeigh J.: May 3, June 15, 1960.
[2] (1889) 41 Ch.D. 456. [3] (1876) 4 Ch.D. 123.

recoverable, see *In re Carnac*[1] and Halsbury's Laws of England, 3rd ed., vol. 2, p. 383, from which it is clear that where money is paid to the Official Assignee under a mistake of law, the court will order it to be refunded. The applicant should, therefore, be allowed to amend the proof of debt so as to reduce the amount claimed from £4,759 4s. 9d. to £519 16s. 0d.

Reid Q.C. and *Russell* for the Official Assignee. The vital fact here is that a claim has been made in bankruptcy and that proof of that claim has been admitted. There is, therefore, a special state of affairs which brings into operation section 262 of the Irish Bankrupt and Insolvent Act, 1857, so that an election must be deemed to have been made. Notional though it may be, such an election has been held in Ireland to be irrevocable: *In re Daly*[2]. In this case the applicant has claimed and proved as a creditor. The Official Assignee concedes that the sum of £4,239 8s. 9d. can be traced in the account of the deceased as the proceeds of sale of the securities. It is also conceded that the principle in *In re Carnac*[1] would apply so as to preclude the Official Assignee from taking advantage of a payment by mistake. But where there is something more than a mere payment by mistake it would seem to take the case outside the principle and make it incumbent on the court to give effect to section 262. If this were a case of election in fact as distinct from an election deemed to have been made, the applicant might have a good answer on the basis of mistake. The effect of the word "deem" is established in *Reg. v. Norfolk County Council*[3] and *Green v. Marsh*[4]. There is no need for an intention to elect; an intention to claim as a creditor is enough if proof of the debt is put in.

In *In re Daly*[2] Harrison J. took the view that he could not give leave to amend the proof of debt because to do so would be prejudicial to the other creditors and because he held that section 262 applied. Admittedly in this case there was a trust but there was also a debt arising out of the contractual position between the deceased and the applicant. In law the applicant could have either claimed the money as being trust funds or claimed in contract for the debt. The latter course was adopted and consequently section 262 applies.

Jones Q.C. in reply. Before it was known that the major part of the proceeds of sale were traceable in the deceased's accounts the applicant, as trustee, had to take the precaution of proving. Section 262 was never designed to cover the position here. It is dealing with

[1] (1885) 16 Q.B.D. 308.
[2] (1872) 6 I.L.T.R. 172.
[3] (1891) 60 L. J. Q.B. 379.
[4] [1892] 2 Q.B. 330.

the question of relinquishing suits and its real import is very clearly summed up in the marginal note which reads—"Proving Debt to be "an Election not to proceed by Action." If the court were to accept the interpretation of *In re Daly*[1] which is contended for by the other side then it must follow that *In re Duggan*[2] was wrongly decided. In that case section 262 was not even mentioned. The right way to deal with this matter is on the basis that the position of a cestui que trust has always been privileged in equity. That was why *In re Hallett*[3] was decided the way it was, with the effect of putting a gloss on *Clayton's* case[4] in favour of a cestui que trust.

Cur. adv. vult.

McVeigh J.: In this case the facts are that the applicant, the Belfast Bank Executor and Trustee Company Limited, as the executors of Hessie Kerr deceased, sold certain securities through the deceased insolvent as stockbroker and the proceeds thereof amounted to £4,759 4s. 9d. At the date of the deceased's death there was £4.239 8s. 9d. of this sum standing to credit in the deceased insolvent's bank and the difference, viz. £519 16s. 0d., was no longer to credit in his bank.

In the administration in bankruptcy of the estate of the deceased under section 21 of the Bankruptcy Amendment Act (Northern Ireland), 1929, the applicants claimed and proved in respect of the total sum as if it were a debt.

It is admitted that the said sum of £4,239 8s. 9d. is traceable and is trust money, and, subject to a decision on the effect of section 262 of the Irish Bankrupt and Insolvent Act, 1857, would have been payable to the applicants.

The applicants contended that as the said traceable sum of £4,239 8s. 9d. was trust money it never legally vested in the Official Assignee and they say that section 262 does not apply in such a case. The Official Assignee on the other hand argued that there was both a trust and a debt and as the applicants elected to claim on the debt the Official Assignee says that this election was fatal to their claim for the trust money because of section 262.

It is clear, I think, that trust money does not vest in the Official Assignee. This is expressly declared in the English Bankruptcy Act of 1883, section 44, and again in the 1914 Act, section 38. There is no such express provision here, but section 267 of the 1857 Act, which is

[1] (1872) 6 I.L.T.R. 172.
[2] (1897) 31 I.L.T.R. 56.
[3] (1879) 13 Ch.D. 696.
[4] (1816) 1 Mer. 572.

the vesting section relating to personal property of a bankrupt, does not vest trust property in the Official Assignee. What is vested is "all the personal estate.... of such bankrupt....". This section, according to Robb on Bankruptcy, p. 142, and as one might expect, has always been construed to mean that property of which the bankrupt was merely a trustee did not pass to the assignee for division among the creditors, and that for the very good reason that such property was not, in fact, the property of the bankrupt, but that of his cestuis que trustent. So far as insolvent estates are concerned the position appears to be similar, for section 21(4) of the Bankruptcy Amendment Act (Northern Ireland), 1929, provides inter alia that: "the property of the debtor shall vest in the official assignee of the "court, and he shall forthwith proceed to realise and distribute that "property....". I should also add that section 21(5) provides that "with the modifications" mentioned in the Act of 1929 "all the pro- "visions of the Acts of 1857, 1872, and 1889, relating to proof of "debts.... shall.... apply to the case of an administration order "under this section....". I accept that the law is correctly stated in Robb on Bankruptcy and, accordingly, as a trust of the money in question is admitted, and also that it is traceable, I hold that this money is not distributable amongst the creditors of the deceased insolvent and does not vest in the Official Assignee. Accordingly, unless there is some legal bar, it ought to be paid to the executors of Hessie Kerr deceased for distribution amongst those who may be beneficially entitled to it. The Official Assignee contends that there is such a legal bar and that it is to be found in section 262 of the Irish Bankruptcy and Insolvent Act, 1857, which is as follows: "No "creditor who has instituted any suit against any bankrupt or "insolvent in respect of a demand prior to the bankruptcy or in- "solvency, or which might have been proved or admitted as a debt "under the bankruptcy or insolvency, shall prove or be admitted as a "creditor under such bankruptcy or insolvency, or have any claim "entered upon the proceedings, without relinquishing such suit; *and* "*the proving or claiming a debt under any bankruptcy or insolvency by* "*any creditor shall be deemed an election by such creditor to take the* "*benefit of such bankruptcy or insolvency with respect to the debt so* "*proved or claimed*; provided that such creditor shall not be liable to "the payment to such bankrupt or insolvent or his assignees of the "costs of such suit so relinquished; and that where any such creditor "shall have instituted any suit against such bankrupt or insolvent, "jointly with any other person, his relinquishing such suit against the "bankrupt or insolvent shall not affect such suit against such other

"person; provided also, that any creditor who shall have so proved or "claimed, if the petition of bankruptcy or insolvency be afterwards "superseded or dismissed, may proceed in the suit as if he had not so "proved or claimed".

The portion of this section which is relied on by the Official Assignee I have emphasised. This section appears to have been copied from section 182 of the Bankrupt Law Consolidation Act, 1849, but that section has now disappeared from the English Bankruptcy Code and is not to be found in the Acts of 1883 or 1914.

No case was cited to me on these sections, nor was I able to find one, which throws light on whether they can be applied to a set of circumstances such as arise in this case, i.e. where there is a trust and where the trust property does not vest in the Official Assignee. The Official Assignee, as I have said, contends that there is here both a trust and a debt and that the applicants by proving a debt have elected to rely on the debt and to take whatever may come to them in the bankruptcy by way of dividend. He cites in support of his contention the case of *In re Daly*[1] where the facts were that mortgagees who had obtained an order for sale of premises, subsequently proved for a portion of the mortgage debt as being the balance over the value of the premises as then estimated by the mortgagees. A dividend being struck on debts proved, the mortgagees refused to accept their quota, pending the realisation of the security. The premises, afterwards sold, realised sufficient to pay the mortgagees in full. The court held that the mortgagees had elected to take a dividend upon the amount proved, as unsecured creditors, and that such election was binding and could not be retracted because of the provisions of section 262 of the Act of 1857. It must be remembered that in this case no question arose as to trust property; it was simply a case where it was open to the creditor, who was himself entitled to the benefit of the security, either to rely on that security or value it and prove for the balance, or prove for his whole debt, and he elected to value it and prove for the balance; which meant that he was taking the benefit of the bankruptcy instead of his security for the portion of the debt which he proved for and it was in this way that section 262 was applied to prohibit him from retracting an irrevocable election and one which had been acted on by all parties and the court. The assignee's account was audited on the faith of it, a dividend was struck with due diligence after audit. This case however does not decide the present one. That section, viz. section 262, is one which raises difficulties as

[1] (1872) 6 I.R.T.R. 172.

to its scope and it may require redrafting at some appropriate time.

What I am really asked to say here is that although the sum of money in question does not vest in the Official Assignee because it is labelled with a trust and is not distributable amongst the creditors, nevertheless that the act of the applicants in proving a debt has made this trust fund vest in the Official Assignee and become distributable among the creditors, and that this effect has come about without the persons entitled to the fund, whether they be infants or persons of unsound mind, having any say in the matter. It would require considerable persuasion to convince me that the general terms of the portion of section 262 relied on in this case have the effect of making this trust fund into distributable assets of the deceased debtor's estate. I am not persuaded that this is so and I accordingly hold that the fund is bound by the trust and so remains, and falls to be paid to the applicants subject to any just and proper deductions in respect of the deceased's professional charges. Having come to this conclusion I see no difficulty in making the amendment asked for, that is to amend the proof of debt from £4,759 4s. 9d. to £519 16s. 0d. So far as I can see, section 262 has no bearing on the making of this amendment, and I am satisfied that no prejudice occurs to the general body of creditors by making it—see *In re Robinson*[1]. It, in fact, is a substantial reduction of the amount sought to be proved in the first instance, but, of course, the creditors will be deprived of the traceable portion of the debt, viz. £4,239 8s. 9d.; however, as I have held that this is not distributable amongst the creditors the amendment is merely consequential upon that.

I should perhaps say here that my decision in *In re Robinson*[1], so far as it relates to the right of secured creditors to amend, is in conflict with that in *In re Daly*[2] cited above. When *Robinson's* case[1] was argued before me the case of *Daly*[2] was not cited to me nor was my attention called to section 262 of the 1857 Act. Accordingly, if a case with facts similar to those in *In re Robinson*[1] arises again I will have to consider whether the decision in that case was correct and, if it is incorrect, whether I have the right to review it on the ground that it was given per incuriam (section 262 not having been cited): see *Parkinson v. Watson*[3]. It is also to be noted that *Daly's* case[2] was not cited to the court in *In re Duggan*[4] nor, judging from the report, was the court's attention called to section 262 of the 1857 Act.

The applicants also contended that the sum of money in question was paid over to the Official Assignee on a mistake of law and I was

[1] [1958] N.I. 166.
[2] (1872) 6 I.L.T.R. 172.
[3] [1956] N.I. 1.
[4] (1897) 31 I.L.T.R. 56.

referred to a series of cases which show that although as between ordinary litigant parties money may be retained by one against the other yet the court will not in some cases allow its officers to retain money or property in circumstances which are considered to be inequitable.

These cases, however, do not relate to trust property, but to property which it is lawful for the officer to retain, but where the court thinks it would not be honourable to do so. Having regard to what I have already decided the principle does not fall to be applied here. Even if it was open to me to apply this principle it seems to me that I would be precluded from doing so because of the decision in *In re Wigzell*[1] which comes closer, I think, to the facts of the present case than any other which I have found on this subject. It deals with the effect of a section of the English Bankruptcy Act of 1914 and makes it clear that a trustee in bankruptcy would still be conducting himself honourably and in a high minded way in acting on statutory provisions which he finds clearly set out before him even though the operation of those provisions occasions hardship. It is the Legislature which has produced the hardship. I need not here go into the details of that case, but I would refer in particular to a passage in the judgment of Scrutton, L.J.[2] which draws out this point in a very clear way.

The applicants must pay the costs of the Official Assignee.

Application allowed.

Solicitors for the applicant: *Johns, Elliot, Wallace & Co.*

Solicitors for the Official Assignee: *C. & J. Black.*

S.M.M.

[1] [1921] 2 K.B. 835.

[2] Ibid. 862, 863.

MINISTER OF AGRICULTURE FOR NORTHERN IRELAND v. McGEOUGH[1]

Agriculture—Importation of Livestock—Order providing for seizure of livestock suspected to have been imported or brought into the United Kingdom in contravention of the Order—Provision placing on claimant the onus of proving that the livestock were not imported or brought into the United Kingdom in contravention of the Order—Whether intra vires—Agriculture Act, 1957 (5 & 6 *Eliz.* 2, *c.* 57), *s.* 6—*Imported Livestock Order*, 1958 (*S.I.* 1958, *No.* 558), *art.* 10.

Section 6 of the Agriculture Act, 1957, empowers the Ministers specified therein by order to make provision in respect of livestock imported into the United Kingdom. Subsection (2) thereof provides that such order may, inter alia, regulate the times and places at which livestock may be imported; and subsection (3) enacts that, subject to the following provisions of the section, such order "may contain such provisions as appear to the Ministers to be "necessary for the due operation and enforcement of the order.... and may "in particular (a) authorise the seizure and sale of livestock, the forfeiture of "livestock and the proceeds of sale of livestock...."

Subsection (5) of the section directs that if a person claims in the prescribed manner that the livestock seized belonged to him at the time of seizure and that "they were not imported or removed or brought into the "United Kingdom in contravention of the order" forfeiture shall only be effected by means of an order of the court.

The Imported Livestock Order, 1958, was made by virtue of the powers conferred by section 6 of the Act of 1957. Article 10 of that Order provides that "When notice of claim in respect of any livestock.... is duly received "....the appropriate Minister shall, unless he admits the claim, take pro-"ceedings for the condemnation by the court of the livestock ... and, unless "the claimant satisfies the court that the livestock.. . was at the time of "seizure his property and ....that it was not imported removed or brought "into the United Kingdom in contravention of this Order.... the court shall "make an order condemning as forfeited such livestock....".

Held, by the Court of Appeal that although the Act of 1957 conferred no express power permitting the onus of showing that there had been no contravention of the Order to be placed on a claimant, such power could be implied, and accordingly the provisions of article 10 of the Order of 1958 were within the powers conferred by section 6 of the Act of 1957.

Minister of Agriculture for Northern Ireland v. McCartney [1948] N.I. 1 considered.

CASE STATED by the County Court Judge of Armagh.

On July 4, 1958, two authorised officers for the purposes of the Imported Livestock Order, 1958, seized fifteen bullocks upon suspicion that they had been imported into the United Kingdom in

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: June 13, 14; Oct. 7, 1960.

contravention of that Order. The defendant having claimed the animals in the manner prescribed by the Order, the Minister brought proceedings at petty sessions for a forfeiture order. The resident magistrate made the order sought and the defendant appealed.

On the hearing of the appeal, it was contended for the defendant that the provisions of article 10 of the Order, insofar as they purported to place upon a claimant the onus of proving that the livestock claimed had not been imported into the United Kingdom in contravention of the Order, were made without statutory authority and were invalid. The county court judge rejected this contention and affirmed the forfeiture order, but stated this case for the opinion of the Court of Appeal as to whether he had been right in holding:

1. That article 10 of the Order of 1958 was intra vires section 6(5) of the Agriculture Act, 1957.
2. That the placing on the defendant of the "onus of proof" was warranted by the provisions of section 6(3) of that Act.

Harrison Q.C. and *O'Donnell* for the defendant and appellant.

Maginess Q.C., *A-G. Nicholson Q.C.* and *McConnell* for the Minister.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: This appeal by case stated is from a decision of the County Court Judge of Armagh dated November 2, 1959, affirming a forfeiture order in respect of fifteen bullocks made on May 12, 1959, by the resident magistrate at Forkhill Petty Sessions.

The proceedings in question were brought under article 10 of the Imported Livestock Order, 1958, which Order purports to have been made by the Minister of Agriculture, Fisheries and Food, the Secretary of State for Scotland and the Home Secretary under the powers conferred by an Imperial enactment, the Agriculture Act, 1957.

The bullocks, the subject of the proceedings, were duly seized under article 7(2) of the 1958 Order on suspicion of having been imported into Northern Ireland in contravention of that Order. The county court judge found as a fact that the bullocks had been so imported. The defendant and appellant did not contest that finding. His point was that article 10 of the 1958 Order was ultra vires the Agriculture Act, 1957, and that, in consequence, the onus of proving that the said bullocks had not been imported in contravention of the said Order

had not been placed upon him and the proceedings for forfeiture lacked jurisdiction.

The relevant parts of article 10 read as follows: "10. When notice "of claim in respect of any livestock.... is duly received in accord- "ance with the foregoing provisions the appropriate Minister shall, "unless he admits the claim, take proceedings for the condemnation "by the court of the livestock.... to which the claim relates and, "unless the claimant satisfies the court that the livestock.... was at "the time of seizure his property and—(a).... that it was not "imported.... into the United Kingdom in contravention of this "Order. .. the court shall make an order condemning as forfeited "such livestock.:...". The Order of 1958 replaced the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, as amended. These Regulations were made under different statutory provisions—those of the now repealed section 28(3) of the Agriculture (Miscellaneous War Provisions) Act, 1940—but the nature of the enabling enactments and of the sub-legislation made thereunder respectively appears sufficiently akin to allow it to be said that if the point now to be considered is good, it was no less good in the case of the 1945 Regulations. It does not seem, however, to have been made before this court until the present appeal. In view of the great number of forfeitures which have taken place under these enactments and of the numerous applications to the courts—usually prosecuted with much diligence and ingenuity—to quash forfeiture orders made thereunder, this is a rather surprising situation and not what one would expect in such a well cultivated field. But that, of course, does not in itself afford an answer to the point under discussion and I must turn to the enabling provisions of the Act of 1957. The most important of these will be found in section 6. Subsection (1) thereof empowers the Ministers who made the Order of 1958 to make special provision in respect of livestock imported into the United Kingdom. Subsection (2) provides that such an Order may, inter alia, regulate the times and places and the routes by which livestock may be imported. Subsection (3) enacts that subject to the following provisions of the section an Order thereunder "may contain such "provisions as appear to the Ministers to be necessary for the due "operation and enforcement of the order.... and may in particular "—(a) authorise the seizure and sale of livestock, the forfeiture of "livestock and the proceeds of sale of livestock....".

Subsection (4) provides for the display or other publication of

notice of seizure. Then comes subsection (5) which contemplates an order being made under section 6 which provides for the forfeiture of, inter alia, livestock that have been seized. It directs that such order shall also make provision so that if a person, in the appropriate manner, claims, first that the livestock seized belonged to him at the time of seizure and, secondly, that "they were not imported.... in "contravention of the order", the forfeiture shall only be effected by a court order. Article 9 of the Order of 1958 states how a claim is to be made and provides for the forfeiture of what has been seized in the absence of such a claim. This article seems clearly within the powers given by the statute and was not challenged. The question is whether, such a claim having been duly made, section 6 allows article 10 to place the onus of showing no contravention of the Order upon the claimant, as it undoubtedly purports to do.

The Act of 1957 confers no express power permitting this in terms. Should, then, such a power be implied? In my opinion this question ought to receive an affirmative answer. It was conceded that the onus of proving the first requirement of article 10—that what was seized was the property of the claimant—was properly placed on the claimant. I cannot think subsection (5) could have contemplated anything else, for who but the claimant could undertake establishing that part of the claim? And, similarly, in enacting this subsection I think the Legislature must have contemplated that the onus respecting the second requirement would likewise be placed on the claimant. This is indeed a grave burden to put upon the owner of what the Crown seeks to have condemned. But the difficulty of preventing the illegal import of livestock across the land boundary has long been recognised as involving a notorious difficulty of proof for which the obvious remedy, the seizure having been made on suspicion, was to place the onus of showing no contravention on the person claiming ownership at the time of the seizure. This, in my opinion, is what the Legislature intended here to make possible. The question of contravention is coupled in the text of the statute with the question of ownership and, in the circumstances, it seems a reasonable assumption that both heads of the claim which must be made to stop an automatic forfeiture were regarded by Parliament as being so likely to lie within the special knowledge of the claimant that power should be given to place the burden of proof upon him in respect of both and so that he would have to prove all he had to assert in order to avoid an extra-judicial forfeiture.

In my opinion, section 6(3), which empowers the Ministers to

make such provisions as appear to them to be necessary "for the due "operation and enforcement of the order", points in the same direction. I do not think anyone versed in these appeals can doubt that if the onus to prove illegal importation rested upon the complainant in cases such as this, the Order of 1958 (like the Regulations before it) could only be operated and enforced with the greatest difficulty and to a very limited extent. If so, the view I take of the implications of subsection (5) would be entirely compatible with this wide and drastic power which the Legislature has thought fit to confer by subsection (3). Indeed, apart altogether from what may be inferred from the terms of subsection (5), I think article 10 may well be justified, having regard to the nature and history of its subject-matter, as an exercise of the powers conferred by subsection (3) alone. How the Order operates depends in large measure on how it can be enforced and enforcement becomes, in the end, a matter of what the courts can do. If the Ministers thought that putting the onus on claimants to disprove illegal importation were necessary for the due operation and enforcement of an Order under section 6, I am unable to hold that they were going outside their powers in so providing.

The appellant called in aid the decision of this court in *Minister of Agriculture for Northern Ireland v. McCartney*[1]. That case arose under regulation 5(5) of the Regulations of 1945 which I have already mentioned. Regulation 5(5) was in somewhat similar terms to article 10 of the Order of 1958 and, as will be remembered, was made under section 28(3) of the Agriculture (Miscellaneous War Provisions) Act, 1940. But at the end of regulation 5(5) were words which are not to be found in article 10. They were—"and the claimant shall not be "entitled to raise any other defence or objection to the making of the "order". The court held that these words were ultra vires and incapable of ruling out a defence advanced on the ground that the proceedings had not been taken by the Minister "as soon as practic-"able", a mandatory requirement provided for by regulation 5(4). This decision would be very much in point if article 10 had confronted the appellant with a similar difficulty, but I cannot hold that it rules the question which we have now to decide. It is true that in one or two passages in the judgments the wording suggests that the whole of regulation 5(5) was ultra vires. For instance Porter L.J. ends his judgment by saying[2]: "I am, therefore, of opinion that "regulation 5(5) is not authorised by section 28(3) of the Act, and is

[1] [1948] N.I. 1. [2] Ibid. 17.

"ultra vires, and that the second question should be answered in the "affirmative". The second question, which will be found on page 10 of the report, related however only to the words "and the claimant "shall not be entitled to raise any other defence or objection to the "making of the order" and I think when the judgments are read carefully it is far from clear that the members of the court intended to go beyond what was necessary for an answer to that question. In any event if there is anything in the judgments to suggest that the whole of regulation 5(5) was ultra vires it was clearly obiter and of no binding effect as respects the present case.

For these reasons I am of opinion that article 10 was not ultra vires.

In paragraph 6 of the case stated the county court judge says that he held:

"(1) That article 10 was intra vires section 6(5) of the Agriculture "Act, 1957; and

"(2) That the placing on the defendant of the 'onus of proof' was "warranted by the provisions of section 6(3) of the Agriculture "Act, 1957".

The question submitted by the county court judge takes this form: "Was I, on the facts proved, right in holding as set out in para- "graph 6(1) and (2) hereof, and in affirming the order of for- "feiture?"

I do not say that the learned judge was wrong in either of these sub-paragraphs, but to answer the question put with an unqualified affirmative might be to emphasise an unnecessary distinction between section 6(5) and section 6(3). I prefer not to regard these subsections independently for present purposes and I think the proper answer to give to the question is:

"Article 10 and the placing thereby on the defendant of the onus of "proving that the livestock were not imported in contravention "of the Order are within the powers conferred by section 6 of the "Agriculture Act, 1957".

This was the only point raised and I would therefore affirm the forfeiture and dismiss the appeal.

BLACK L.J.: The questions which the learned county court judge has submitted in the case stated for the opinion of the court are whether he was right in holding:

(1) that article 10 of the Imported Livestock Order, 1958 was intra vires section 6(5) of the Agriculture Act, 1957; and

(2) that the placing on the defendant of the "onus of proof" was warranted by the provisions of section 6(3) of the Agriculture Act, 1957:

and in affirming the order of forfeiture of the cattle.

The first point raised by counsel for the appellant was that under section 6(1) of the Act of 1957 an Order such as the Imported Livestock Order, 1958 (which for convenience I shall refer to as the Order of 1958) could only be made for the purpose described in section 5(1) of the Act, viz., for the purpose of supporting any arrangements in force by virtue of an order under section 1 of the Act, and that they had been unable to discover that any Order had been made under section 1 of the Act before the making of the Order of 1958. This contention, however, was answered by the Attorney-General who pointed out to us that under section 36(3) of the Act of 1957 it was provided that the period during which orders under section 4(1) of the Agriculture Act, 1947, had effect should be extended until the commencement of Part I of the Act of 1957, and that any Order in force under that subsection of the Act of 1947 should continue in force and have effect as if made under section 1 of the Act of 1957. Accordingly, the arrangements in force under the Fatstock (Guaranteed Payments) Order, 1957 (S.I. 1957, No. 370) which remained in force until revoked by the Fatstock (Guaranteed Payments) Order, 1960 (S.I. 1960, No. 428) fell to be treated for the purposes of sections 5 and 6 of the Act of 1957 as though in force by virtue of an Order made under section 1 of that Act.

The next contention of the appellant (and this was really the contention on which the appeal to this court was founded) was that the provisions of section 6(5) of the Act of 1957 did not justify the enactment in article 10 of the Order of 1958 of provisions throwing upon the claimant the onus of satisfying the court that the livestock was his property at the time of seizure and that it was not imported, removed or brought into the United Kingdom in contravention of the Order.

In the Customs Acts the Legislature has enacted express provisions throwing the burden of proof of lawful importation upon the defendant in proceedings under those Acts (see Customs and Excise Act, 1952, section 290(2) and the earlier Customs Consolidation Act, 1876, section 259), and one would have thought that those responsible

for the framing of the Agriculture Act, 1957, with these provisions of the Customs Acts before them, would have taken the precaution of inserting similar provisions in section 6 of the 1957 Act. Nevertheless I think that the terms of section 6(3) providing that an Order made under the section might contain such provisions as appeared to the Ministers to be necessary for the due operation and enforcement of the Order are sufficiently wide to justify the insertion in the Order of provisions casting upon a claimant to the ownership of livestock which had been seized on suspicion the burden of establishing that the livestock had not been imported in contravention of the Order. It would appear to me that the appellant's contention on this point must rest on the belief that there is an inflexible rule of law that in criminal or forfeiture proceedings the burden of proof must always rest on the prosecutor. This, however, to say the least of it is by no means clear. There is a considerable body of authority that even in certain criminal cases where the subject matter is peculiarly within the accused person's own knowledge the onus may not be upon the prosecution but upon the accused person. Modern instances are *Williams v. Russell*[1]; *R. v. Oliver*[2]; *John v. Humphreys*[3]. Whatever be the precise extent of the circumstances to which this rule is applicable, the possible existence of such a rule in certain circumstances cannot be dismissed as foreign to our law. It is to be presumed that a procedure envisaged by an Act of Parliament is intended to be workable. It required but small experience of the litigation arising out of trans-border traffic in livestock to realise that an Act of Parliament providing for court proceedings for the forfeiture of illegally imported livestock would in practice be useless and unworkable unless the onus of proving that the livestock had not been illegally imported was intended to be borne by the claimant. In cases falling under section 6 of the Act of 1957, the question of how the livestock came to be within the United Kingdom will almost always be a matter peculiarly within the knowledge of the owner and may be merely a matter of suspicion so far as the seizing officer or any official of the Ministries is concerned. Accordingly, I see no transgression of any inflexible legal principle in throwing upon the claimant the onus cast upon him by article 10 of the Order of 1958, and in answer to the two specific questions of law submitted by the county court judge I am prepared to hold that the provisions of article 10 are intra vires and that the placing upon the defendant of the onus of proof that the livestock had not been imported into the United Kingdom in con-

[1] (1933) 149 L.T. 190.
[2] [1944] K.B. 68.
[3] [1955] 1 All E.R. 793.

travention of the Order was warranted by the provisions of the Act of 1957.

I would be unwilling, however, to answer the general question posed by the county court judge whether he was right in affirming the order of forfeiture inasmuch as an affirmative answer to this question might be thought to be a decision that all the provisions of the Order of 1958 were unimpeachable on any ground. I have particularly in mind the point which I ventured to indicate in regard to the former Regulations (S.R. & O. 1945 No. 942) in the concluding portion of my judgment in *Minister of Agriculture for Northern Ireland v. McCartney*[1]. The same point seems to me to arise under article 9 of the Order of 1958. Under article 9 livestock seized in accordance with the provisions of the Order is automatically deemed to be condemned as forfeited subject only to the owner of the livestock claiming that either it was not imported, removed or brought into the United Kingdom from the Channel Islands, the Isle of Man or the Republic of Ireland, or it was not so imported, removed or brought in in contravention of the Order. A result of a sweeping provision such as this appears to me to be that if livestock which had been illegally imported is seized and sold to a purchaser under the provisions of the Order and is subsequently seized (albeit under quite bona fide suspicion) while in the hands of the purchaser or of a subpurchaser it will be automatically condemned as forfeited. If this is a consequence of the provisions of article 9 one would find it difficult to uphold the article as being intra vires. As I admitted in *McCartney's* case[1], there may be some easy answer to the difficulty which I feel. The draftsman of the Order of 1958 does not appear to have been worried about the point, for with *McCartney's* case[1] presumably before him he followed in the opening words of article 9 what had seemed to me to be of questionable validity in article 5(4) of the Regulation of 1945. And so far as I am aware the point has not been taken up in any of the cases which have come before the courts since *McCartney's* case[1]. It does not appear to have been relied upon in the present case before the county court judge, nor was it relied upon or discussed in the argument in this court where the whole contention centred upon the validity of the provisions of article 10. Accordingly I do not think that the court is called upon to pass upon the point in the present case. I can only say that if there is an answer to it the answer has so far eluded me. I have no doubt that it can never have been the intention of the framers of the Orders to word them so as to bring about such a

[1] [1948] N.I. 1, 27.

result as I have apprehended. But we can only go by the wording which in fact has been used. The wording appears to me to be clear and unambiguous. It would seem to me that to escape such a result in the special case which I have mooted would involve rewriting article 9. And an attempt to get over the difficulty by a construction of the article which would avoid the result would appear not entirely dissimilar from the process of which the House of Lords expressed so vigorous disapproval in *Magor and St. Mellon's Rural District Council v. Newport Corporation*[1].

CURRAN L.J.: I agree with the judgment of the Lord Chief Justice, and have nothing to add.

Appeal dismissed.

Solicitor for the defendant and appellant: *P. G. Curran.*

Solicitor for the Ministry: *Chief Crown Solicitor.*

J.P.

[1] [1952] A.C. 189.

McCULLOUGH v. MINISTRY OF COMMERCE FOR NORTHERN IRELAND[1]

Compulsory acquisition of land—Acquisition of premises subject to the Rent Restrictions Acts—Right of statutory tenant to claim compensation—Roads Act (Northern Ireland), 1948 (*c.* 28), *ss.* 34, 42(1), *Sch.* 5.

A dwelling-house and premises to which the Rent Restrictions Acts applied were compulsorily acquired by the Ministry of Commerce pursuant to the provisions of the Roads Act (Northern Ireland), 1948, and the plaintiff, who was the statutory tenant of the premises, claimed compensation for the loss of his interest in the premises. On a case stated by an official arbitrator as to whether he was entitled to compensation it was *held* that he was so entitled.

Per Black L.J.: Although a statutory tenant has no interest in the premises which he occupies which would be recognised at common law, he has had conferred upon him by statute such rights in respect of the premises against his landlord, his subtenants (where permitted) and others that his right to the premises is something in the nature of a right in rem, and as such is an interest in the premises; the term "interest", as used in the Fifth Schedule to the Act of 1948, is not confined to interests known to the common law, but is wide enough to include interests created by statute, and accordingly, a statutory tenant is entitled to claim compensation under that Act.

Per McVeigh J.: A statutory tenant has no interest in the premises which he occupies, but only a "status of irremovability", and accordingly a statutory tenant would not be entitled to compensation under the provisions of the Lands Clauses Acts. Under the provisions of section 34 of the Roads Act (Northern Ireland), 1948, however, the Ministry may acquire "land" which, by section 42(1) includes "buildings and land covered by water, and "any estate or interest in land and any easement or right in, to or over land or "water", which words are wide enough to include the right of a statutory tenant; and therefore, since the compensatable interests are the same as those which may be acquired, a statutory tenant is entitled to compensation.

SPECIAL CASE STATED pursuant to section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, by an official arbitrator on a point of law arising in the course of a claim for compensation under the Roads Act (Northern Ireland), 1948.

The applicant was the tenant of a dwelling-house and premises to which the Rent Restrictions Acts applied, and which became vested in the Ministry of Commerce for Northern Ireland by virtue of a vesting order made pursuant to the provisions of the Roads Act (Northern Ireland), 1948. The applicant claimed compensation, and his claim was referred to the official arbitrator. During the course of the arbitration, certain questions were raised as to whether the appli-

[1] In the Queen's Bench Division before Black L.J. and McVeigh J.: June 13, 14, 1959; June 10, 1960.

cant was a statutory or a contractual tenant of the premises and as to his right to compensation, and the arbitrator at the request of the Ministry, stated this case for the opinion of the High Court on the following questions:

A. Was the applicant on the coming into operation of the vesting order (a) a monthly tenant of the premises or (b) a statutory tenant of the premises?

B. If the applicant was, on the coming into operation of the vesting order, a monthly tenant of the premises, had he an interest in the premises sufficient to entitle him to any compensation for the acquisition by the Ministry of the premises?

C. If the applicant was, on the coming into operation of the vesting order, a statutory tenant of the premises, had he an interest in the premises sufficient to entitle him to any compensation for the acquisition by the Ministry of the premises?

[Question D. raised certain other matters not material to this report].

E. In the circumstances of the case, has the applicant a legal right to compensation by reason of the acquisition by the Ministry of the premises and, if so, for what matters, and on what basis. should such compensation be assessed?

At the hearing before the Divisional Court it was conceded that the applicant was a statutory tenant of the premises.

Maginess Q.C., *A-G*, *Nicholson Q.C.* and *MacDermott* for the Ministry.

Jones Q.C. and *Craig* for the claimant.

Cur. adv. vult.

BLACK L.J.: This matter comes before the court upon a special case stated by an arbitrator under the provisions of section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, seeking the opinion of the court upon certain questions arising out of a claim by the applicant for compensation for the compulsory acquisition by the Ministry of Commerce of a dwelling-house in the applicant's occupation at Knockbracken.

The facts set out in the case stated may be summarized shortly as follows. On September 21, 1956, the Ministry of Commerce, acting under the powers conferred by the Roads Act (Northern Ireland), 1948 (to which I shall refer in this judgment as "the Act of 1948"), made a vesting order vesting in the Ministry the lands described in

the schedule to the order free from all charges or incumbrances whatever in accordance with and subject to the provisions of the Fifth Schedule to the Act. The premises described in the schedule to the vesting order included amongst others the dwelling-house occupied by the applicant.

This dwelling-house had been held by the applicant from one Alexander Thompson as tenant for twelve months from May 1, 1939, and thereafter from month to month under a tenancy agreement dated May 3, 1939, at a rent of £25 per annum. This rent was subsequently increased in September 1947 to £28 7s. 0d. inclusive per annum. In the case stated the arbitrator states that on the evidence before him he would be prepared to hold that the applicant was a "statutory tenant", that is to say that he was occupying the premises by virtue of the statutory rights conferred by the Rent Restrictions Acts.

In his claim for compensation the applicant set out the nature of his interest as "statutory tenant". At the hearing before the arbitrator the point appears to have been raised as to whether the applicant was a monthly tenant (in the ordinary common law sense of that phrase) or whether he was a "statutory tenant", and accordingly the first two questions upon which the arbitrator sought the opinion of the court were:

A. Was the applicant on the coming into operation of the vesting order (a) a monthly tenant of the premises, or (b) a statutory tenant of the premises?

B. If the applicant was, on the coming into operation of the vesting order, a monthly tenant of the premises, had he an interest in the premises sufficient to entitle him to any compensation for the acquisition by the Ministry of the premises?

It is unnecessary, however, to dwell on these questions, as at the hearing before us it was conceded that at the time of the vesting order the applicant was not a contractual tenant but a statutory tenant and the argument proceeded on this basis.

The third question propounded by the arbitrator was:

C. If the applicant was, on the coming into operation of the vesting order, a statutory tenant of the premises, had he an interest in the premises sufficient to entitle him to any compensation for the acquisition by the Ministry of the premises?

In order to arrive at an answer to this question it is obviously

necessary to have regard in the first place to the statutory provisions concerning the compulsory acquisition of property by the Ministry under the powers conferred by the Act of 1948, and in particular to the statutory provisions as to the right to compensation for property so acquired. And having examined these provisions it will then become necessary to consider the nature of a statutory tenancy under the Rent Restrictions Acts and to seek to determine whether a statutory tenant has such an interest in the premises which he is occupying under the protection of those Acts as to entitle him to compensation if he loses possession of those premises as a result of the compulsory acquisition of the premises by the Ministry under the provisions of the Act of 1948.

Dealing then in the first place with the first of these two matters, it is provided by section 34(3) of the Act of 1948 that where the Ministry desires to acquire otherwise than by agreement any land which it considers necessary for the purpose of the exercise of its functions under the Act it shall have power to make a vesting order vesting such land in it in accordance with and subject to the provisions of the Fifth Schedule to the Act, and the subsection goes on to enact that a vesting order so made shall have effect as provided in the said Schedule. It is not indicated in the Act of 1948 to what extent the Lands Clauses Acts are to be treated as applying to compulsory acquisition under that Act, although references to the Lands Clauses Acts will be found in paragraphs 12, 20 and 24 of the Fifth Schedule to the Act. But a perusal of this Fifth Schedule to the Act of 1948 suggests that the provisions of that Schedule in regard to the compulsory acquisition of land under that Act and the assessment of compensation therefor must be taken, in the main at any rate, as substituted for the compulsory purchase sections of the Lands Clauses Acts.

Paragraph 2(3) of this Fifth Schedule directs that where the Ministry proposes to acquire land compulsorily a notice of its intention to do so must be served on every person appearing to have an interest in such lands and must be published in two successive weeks in one or more than one newspaper circulating in the locality. Paragraph 3(1) then provides that on the expiration of a month after the last publication of the notice the Ministry, after considering all objections which may have been presented by any person interested in the land, may make an order vesting in it all or any part of the land.

The effect of a vesting order is set out in paragraph 5 of the

Schedule which provides that a vesting order shall be effectual to pass and vest in the Ministry an estate in fee simple in the land to which it relates, discharged from all claims, estates, incumbrances or charges whatsoever and that the rights and claims of all persons in respect of such land or any interest therein shall as from the date of the vesting be transferred and attached, to the extent to which compensation may be payable in accordance with the provisions of the section, to the Consolidated Fund, and shall be discharged by payments made by the Ministry.

As regards the assessment of compensation, paragraph 9(1) of the Schedule enacts that as soon as a vesting order has become operative, any question of disputed compensation arising between the Ministry and any person interested in any land to which the vesting order relates shall be referred to and determined by an official arbitrator in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, as amended by the Referees and Arbitrators (Procedure) Act (Northern Ireland), 1922.

Paragraph 10 of the Schedule provides that as soon as practicable after a vesting order has become operative the Ministry shall cause to be made out maps and schedules of the lands to which the vesting order relates, together with the names, so far as the same can be reasonably ascertained, of all persons who immediately prior to the making of the vesting order were interested in such lands as owners or reputed owners, lessees or reputed lessees, or occupiers. And paragraph 11 directs that as soon as an official arbitrator has been appointed the Ministry shall deliver to him one copy of each of the maps and schedules and shall publish a notice to claimants of his appointment etc. in one or more newspapers and by placards and handbills and also by sending a notice by post to all persons who, immediately prior to the making of the vesting order, appeared to the Ministry after due inquiry to have an interest in the lands.

It is a well-established principle under the statutes dealing with the compulsory acquisition of land that the only persons entitled to compensation (in the absence of some special statutory provision to the contrary) for land compulsorily acquired are persons entitled to some estate or interest in the land itself. Persons who have nothing in the nature of a proprietary interest in the land itself but have merely a right in personam against the owner of an estate in the land, such as, for example, a right in the nature of a licence to use the land, have prima facie no right to compensation: *Frank Warr & Co. Ltd. v.*

London County Council[1]; *Walton Harvey Ltd. v. Walker & Homfrays Ltd.*[2]. I see no reason why this general principle should not apply in the case of the compulsory acquisition of land under the provisions of the Act of 1948. The vital question accordingly is whether the effect of the provisions of the Rent Restrictions Acts is to confer on the so-called "statutory tenant", while in occupation of premises by virtue of the protection conferred by those Acts, an estate or interest in the premises themselves which will fall within the compensation provisions of the Act of 1948.

The applicant puts his case in two ways. In the first place he relies on the definition of "land" in section 42(1) of the Act of 1948. Under that definition "land" includes buildings, and substituting the word "buildings" for "land" in the last part of the definition he claims that land as defined in and dealt with by the Act includes any right in or to a building. He argues accordingly that his right in or to his dwelling-house as a statutory tenant is, putting it at its lowest, an interest falling within the definition of "lands" in the Act, and that it necessarily follows that his deprivation of this interest on the compulsory acquisition of his premises by the Ministry must be compensated for. Personally I would find difficulty in accepting this argument. I think it goes too far and puts too great a strain on the definition in section 42. Such reasoning would seem to me to involve that a pure right in personam affecting land would have to be held to be itself "land" within the definition.

In the second place, the applicant contends that on the true interpretation of the Rent Restrictions Acts the interest of a statutory tenant under those Acts is an actual interest in the premises themselves and that therefore he had immediately before the making of the vesting order a right in respect of an interest in his premises which, according to the wording of paragraph 5 of the Fifth Schedule to the Act of 1948, has become transferred and attached to the Consolidated Fund of Northern Ireland.

On behalf of the Ministry on the other hand it is contended that a statutory tenant has no interest in the premises of which he is in occupation under the protection of the Acts. In support of this view the Ministry cite dicta of eminent judges in appellate courts to the effect that a statutory tenant has no estate or interest in the premises. For instances in the more recent cases of such dicta, reference may be made to the judgments of Evershed M.R. in *Dudley and District*

[1] [1904] 1 K.B. 713. [2] [1931] 1 Ch. 274.

Benefit Building Society v. Emerson[1] and of Denning L.J. in *Solomon v. Orwell*[2]. And it is pointed out that in reliance on such expressions of judicial opinion it is stated in the latest (10th) edition of Cripps on Compensation (at 3-209) that a statutory tenant is not entitled to compensation under the Lands Clauses Acts and that the same view is taken in Megarry on the Rent Acts, 8th ed., p. 21. So far as I am aware, however, the question of the statutory tenant's right to compensation has never arisen for actual decision in any reported case.

The precise legal position of a statutory tenant has not proved to be easy to determine. It has, of course, to be elicited from the provisions of the Rent Restrictions Acts themselves, with the assistance of the reported judicial decisions upon the numerous and varied problems to which those Acts have given rise. I do not propose to go through the Acts exhaustively. Much less do I propose to go through the multitude of cases in which the courts have endeavoured to elucidate the difficulties which have emerged in seeking to determine the application of the provisions of the Acts to an apparently unending variety of circumstances. But in order to arrive at a conclusion upon the specific point which arises for decision in the present case, I think it is necessary to refer shortly to some of the provisions of the Acts and to a few of the reported cases. For convenience I shall address myself primarily to the Act of 1920 inasmuch as for our purpose the conclusions to be drawn from that Act seem to me to be unaffected by subsequent Northern Ireland legislation.

It is well established by decisions and dicta that a so-called statutory tenancy under the Rent Restrictions Acts is not a tenancy in the common law sense of that term and that indeed the statutory tenant has no estate or interest in the premises of any type known to the common law. His right is merely the right which he enjoys by virtue of the negatively expressed provisions of section 5 of the Act of 1920 (as varied and amended by subsequent Acts) to continue in possession of his dwelling-house unless and until a competent court at the suit of his landlord makes an order ejecting him from it upon one of the specific grounds upon which such an order is sanctioned by the Acts. His right is in one sense a purely personal right. The only person who can enjoy it is the statutory tenant himself (or after his death his widow or a member of his family by virtue of the definition of "tenant" in section 12(1) (g) of the Act of 1920). He cannot assign it

[1] [1949] 1 Ch. 707, 717. [2] [1954] 1 All E.R. 874, 876.

or dispose of it either by a transaction inter vivos or by will, and if he is adjudicated bankrupt it will not vest in his assignee. To say, however, that the statutory tenant's right is a purely personal right in the sense that he is the only person who can enjoy it and that he cannot transfer it does not mean that it is necessarily a mere right in personam such as were the rights discussed in *Frank Warr & Co. Ltd. v. London County Council*[1] and *Walton Harvey Ltd. v. Walker & Homfrays Ltd.*[2]. A man may have a right which he alone can enjoy and which he cannot transfer and which may be a purely personal right in that sense, but it may nevertheless not be merely a right in personam but a right in rem, a right good against all the world. This will be found clearly brought out by Lord Porter in *Baker v. Turner*[3] in a passage which is not without a relevance to the issue in the present case.

Although it has been held that the Acts do not confer upon the statutory tenant any estate or interest known to the common law, yet his position vis-à-vis his landlord is in many respects closely analogous to that of an ordinary contractual tenant. By section 15(1) of the Act of 1920 it is enacted that so long as he retains possession of the dwelling-house he shall observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy so far as they are consistent with the provisions of the Act. In *Hewitt v. Rowlands*[4], a landlord was held to be liable under this section to a statutory tenant for breach of covenant to keep the premises in repair. And in *Lavender v. Betts*[5] it was held that a landlord physically interfering with the premises without an order of the court was liable to a statutory tenant for breach of a covenant for quiet enjoyment and that the damages awarded to the statutory tenant might be punitive. It can hardly be said that these decisions between tenant and landlord establish that the statutory tenant has by virtue of section 15(1) of the Act any greater right than a right in personam, though it emphasizes how much his position resembles that of an ordinary common law tenant. But there are other decisions and other considerations which appear to me to establish that the statutory tenant has a wider right, a right to or interest in the property itself. Thus he has not only a right to occupy and enjoy the premises while his statutory tenancy subsists, but he has a right to exclude all other persons—including his own landlord—from occupying or interfering with the premises. In *Cruise v. Terrell*[6] it was decided that if a land-

1 [1904] 1 K.B. 713.
2 [1931] 1 Ch. 274.
3 [1950] A.C. 401, 416.
4 (1924) 93 L.J. K.B. 1080.
5 [1942] 2 All E.R. 72.
6 [1922] 1 K.B. 664.

lord of premises held on a statutory tenancy enters on the premises in reliance on his common law right of entry and without having obtained an order for possession from the court he will be liable in damages in an action at the suit of the statutory tenant. And in *Remon v. City of London Real Property Co. Ltd.*[1] it was held that the court will intervene by injunction to prevent a re-entry by the landlord in such circumstances. Such decisions as these seem to establish that a statutory tenant has an interest in the premises which differs from and goes beyond a mere right in personam. Moreover the provisions of section 15(3) of the Act of 1920 recognize that a statutory tenant (unless the terms of the contractual tenancy under which he had held prohibited such subletting) may make a subletting of part, though not of the whole, of the premises: *Roe v. Russell*[2]. And this may lawfully be done not only by the original statutory tenant but by the widow of a statutory tenant who became statutory tenant on his death by virtue of the definition of tenant in section 12(1) (g) of the Act of 1920: *Lewis v. Reeves*[3]. Just as the statutory tenant has no estate or interest in the premises known to the common law so the subtenant can have no such estate or interest: per Denning L.J. in *Solomon v. Orwell*[4]. But the fact that the Acts contemplate that a statutory tenant may create subtenancies of the premises which are recognized as valid by the Acts appears to me to indicate that if the statutory tenant has no estate or interest in the premises known to the common law he has at any rate an interest in the premises themselves which is recognized by and indeed is the creation of the statutes. In *Lask v. Cohen*[5] it was decided that a statutory tenant can maintain an action of ejectment against his subtenant. It is hard to see how a person can maintain an action of ejectment unless he has an interest in the premises sought to be recovered in the action. And it is perhaps worth noting that the Legislature itself in section 15(3) of the Act of 1920 (followed in its terms by section 18(3) of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940) speaks of the *interest* of a tenant of a dwelling-house in circumstances where the tenant whose interest is spoken of may be, and indeed in most cases will be, a statutory tenant.

The classic description of the status of a statutory tenant is contained in the judgment of Scrutton L.J. in *Keeves v. Dean*[6] where he says: "Parliament has certainly called him a tenant, and he appears

1 [1921] 1 K.B. 49.
2 [1920] 2 K.B. 117.
3 [1952] 1 K.B. 19.
4 [1954] 1 All E.R. 874, 876.
5 [1925] 1 K.B. 584.
6 [1924] 1 K.B. 685, 694.

"to have something more than a personal right against his landlord. "I take it that he has a right as against all the world to remain in "possession until he is turned out by an order of the court, and that "he could maintain trespass against any person who entered the "premises without his permission". This dictum has been quoted with approval in the House of Lords by Lord Porter in *Baker v. Turner*[1] in a passage to which I have already referred. A person who has a right against all the world to remain in possession of premises has certainly something in the nature of a right in rem which is surely an interest in the premises themselves. Unless one starts with the proposition that the only interests which can possibly exist in property are those known to the common law and is prepared to deny that other types of interests in property can be created by statute, I think one is driven to the conclusion that a statutory tenant has an interest in the premises themselves which would be such an interest as would fall within the compensation provisions of the Act of 1948. In my view the word "interest" as used in the Fifth Schedule to the Act is not confined to interests known to the common law. It is wide enough to include interests which are the creation of statute.

This conclusion appears to me to accord with the exposition of the statutory tenant's status in the judgment of Barry J. in *Brown v. Ministry of Housing and Local Government*[2]. Barry J., speaking of the form of property which a statutory tenant possesses, says[3]: "It is not a "form of property known to the common law, it is a creature of "statute, it does not create any estate in the land or premises occupied "by the statutory tenant, but none the less I think it would be a very "unreal view to take if I were to hold that in no sense of that term can "a statutory tenant be regarded as having a right of property con- "ferred on him by the Rent Restrictions Acts". And later in the judgment he goes on to say: "I think, using the word 'occupier' in its "widest sense, that the Rent Restrictions Acts do confer on a pro- "tected or statutory tenant some interest in the premises which he "occupies. As I say it is an interest which is purely the creature of "statute, but it is there, and it is, I am satisfied, an interest of very "considerable value. It is a personal interest, it is, in some sense, a "negative interest, being a right not to be removed from the premises, "but none the less I think it is an interest which can properly be "referred to as 'any property of the applicant' in the sense in which "that phrase is used in the schedule". (sc. Schedule I to the Acquisition of Land (Authorisation Procedure) Act, 1946).

[1] [1950] A.C. 401, 416.
[2] [1953] 2 All E.R. 1385.
[3] Ibid. 1392.

I am accordingly of opinion that question C. submitted by the arbitrator should be answered in the affirmative by declaring that the applicant had an interest in the premises sufficient to entitle him to compensation for the acquisition by the Ministry of the premises.

If question C. is answered in the affirmative, then question D. propounded by the arbitrator does not arise.

The final question submitted by the arbitrator is:

E. In the circumstances of this case has the applicant a legal right to compensation by reason of the acquisition by the Ministry of the premises and, if so, for what matters and on what basis should such compensation be assessed?

I have already expressed the opinion that the applicant has a legal right to compensation. The question for what matters and on what basis should such compensation be assessed was not developed before us, presumably as the special case (as appears from paragraph 6) was only asked for in order to secure a decision as to whether the applicant had by reason of his limited interest in the premises any claim at all to compensation against the Ministry. I should be loth to embark on an exposition of how the applicant's compensation should be assessed without having heard the rival contentions of the applicant and the Ministry (so far as they might be in disagreement) formulated and argued. I think the proper course is to send the matter back to the arbitrator with our answer to question C., and if any legal difficulties emerge in regard to how compensation should be assessed the parties can request him to state a supplemental case. I would only venture to observe that although the interest in premises of a statutory tenant under the Rent Restrictions Acts is undoubtedly an interest of value to him it is an interest fraught with a number of grave weaknesses. It can only last at most for the statutory tenant's own lifetime, subject of course to the fact that after his death his widow or a member of his family may possibly step into his shoes as a statutory tenant by virtue of the definition in section 12(1) (g) of the Act of 1920. The statutory tenant cannot sell his interest or receive any payment for giving up possession of the premises except only from his landlord (section 15(2) of the Act of 1920). And above all he is always under the shadow that his landlord may at any time bring ejectment proceedings and may obtain an order from the court putting an end to the statutory tenant's occupation of the premises if the landlord can succeed in establishing any of the grounds upon which the Acts pro-

vide that a landlord can obtain an order of the court for the recovery of possession of premises to which the Acts apply.

McVeigh J.: This matter comes before us by way of case stated by an arbitrator under section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, and arises out of an arbitration held by him under section 34 and the Fifth Schedule of the Roads Act (Northern Ireland), 1948.

The facts and contentions of the parties are fully set out in the case stated. The matter concerns the tenancy of the premises of the applicant, being a dwelling-house "with small garden at side" situate at Knockbracken, Newtownbreda, County Down, which were let to the applicant by agreement in writing dated May 3, 1939. The tenancy was for twelve months certain and thereafter was to continue from month to month, the rent to be at the rate of £26 per annum. This agreement contained a clause which prohibited the applicant from (inter alia) subletting, or using the premises for any trade or business without the consent in writing of the landlord or his agent. The rent of these premises was increased pursuant to notice under the Rent Restrictions Act (Northern Ireland), 1940, dated September 10, 1947. The first question posed in this case is whether the applicant is a contractual or statutory tenant, but counsel for him conceded that he was a statutory tenant and we are asked to decide the case on this basis. Accordingly, Question A. falls to be answered —"A statutory tenant". Question B. does not arise.

On September 21, 1956, the premises described above, and of which the applicant was a statutory tenant, became vested in the Ministry of Commerce pursuant to the provisions of the Roads Act (Northern Ireland), 1948. After the making of the vesting order the applicant was permitted to remain in the premises, in an outbuilding of which he carried on a small motor repairing business, but he was eventually required to leave the premises on November 30, 1956. He moved to premises at No. 37 Lisburn Road, Belfast, which he had acquired on a lease for 9,000 years from November 15, 1956, at a price of £600 and on an undertaking to pay a rent of £5 per annum. The applicant, so the case states, is "unable" to carry on his motor repairing business at 37 Lisburn Road, but whether this is because of planning restrictions or lack of accommodation is not stated and, in any event, no claim appears to be made in respect of this business.

Because of the acquisition of the premises by the Ministry and the necessity for the applicant to find other accommodation he claims

that by reason of his occupation of the premises as a statutory tenant he has a compensatable interest therein which includes compensation for what is called disturbance.

When the matter is explored it is found to be somewhat complicated and involves a consideration not only of the Roads Act (Northern Ireland), 1948, but also of other Acts which relate to compulsory acquisition of land. The Roads Act provides (inter alia) that in certain circumstances roads and proposed roads may be designated trunk roads and in such event the Ministry of Commerce then becomes the road authority for those roads and is given wide powers to construct, maintain and improve such roads; towards this end the Ministry is (inter alia) given powers under section 34 of the Roads Act to "purchase (either by agreement or compulsorily....) "or take on lease any land...." Land for the purposes of the Act is defined in section 42 as follows: " 'land' includes buildings and land "covered by water and any estate or interest in land and any easement "or right in, to or over land or water".

This section enables all necessary estates, interests and rights to be taken in order that the Ministry may exercise its functions, but does not in any plain or clear way set out specifically what are compensatable interests. These can only be gathered from the expression set out above as the definition of "lands", and I am prepared to hold that the compensatable interests are the same as those which may be acquired. The applicant points to the words in this section "right in, "to or over land" which he says are very wide words and which he contends would include the applicant's right as a statutory tenant, being a right to remain in possession of the dwelling-house and garden, a right to resist the efforts of anyone to put him out, and also being a valuable possession which could be sold to his landlord pursuant to section 18(2) of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940. The Rent Acts also provide that the statutory tenant has the benefit of the contractual terms of the tenancy which include the right to quiet enjoyment: see section 15 of the Act of 1920.

The first point to be considered and decided in this case is as to the legal status of the applicant, he being a person who is protected in his possession by the Rent Acts. What is the position of a statutory tenant under the Rent Restrictions Acts? What interest (if any) has he in the controlled premises? These are questions which have been considered from time to time by the courts, and the description of

his status most frequently referred to is that of Bankes L.J. in *Keeves v. Dean*[1] which has been approved by Lord Reid in the House of Lords in *Baker v. Turner*[2]. These authorities show that a statutory tenant is not a tenant at all. He cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one and, as such, unless the statute authorises him to pass it on to another person, must cease the moment he parts with the possession or dies. So long as he remains on in possession under the Acts he must observe, and is entitled to the benefit of, all the terms and conditions of the original tenancy. He has, it seems, no estate or interest in the land: *Dudley and District Benefit Building Society v. Emerson*[3], per Evershed M.R. The principles stated in *Keeves v. Dean*[1] were accepted by the Court of Appeal in Northern Ireland in *Drury v. Johnston*[4] in which Moore L.C.J. says: "a statu- "tory tenancy has none of the attributes of a tenancy. It is a mere "personal licence and not a tenancy. If it were an interest in land, it "could certainly be transferred". See Sargant L.J. to the same effect in *Roe v. Russell*[5]. I need only refer to two other authorities, firstly *Skinner v. Geary*[6], which I refer to because of the words, very pertinent having regard to the point raised here, used by Scrutton L.J. where he says[7]: "Through these cases the Court was gradually "moving to the view that the statutory tenant's right was not a right "of property unless such a right was expressly given by the Acts, as, "for instance, the right given on intestacy, a provision which has not "yet come before this Court for consideration, but that the right of "the statutory tenant is a purely personal right to occupy the house "as his home". He merely has, as Lush J. said in *Keeves v. Dean*[8], "a status of irremovability". This description is accepted by Evershed M.R. in *Marcroft Wagons Ltd. v. Smith*[9], the second authority to which I wish to refer. In considering whether a "holding-over" after a statutory tenancy, on the facts of the case before him, created a tenancy or licence the Master of the Rolls, in referring to the statutory tenancy, said[10]: "the existence of this conception of an occu- "pational right without an estate in the land may alter or affect the "inference to be drawn from facts which, in other days, would have "been held to amount to a tenancy". From this case it is also plain that the court considered that a person enjoying exclusive possession

1 [1924] 1 K.B. 685, 690.
2 [1950] A.C. 401, 437.
3 [1949] Ch. 707, 717.
4 [1928] N.I. 25, 30.
5 [1928] 2 K.B. 117, 131.
6 [1931] 2 K.B. 546.
7 Ibid. 559.
8 [1924] 1 K.B. at 686.
9 [1951] 2 K.B. 496, 507.
10 Ibid. 504.

and paying a rent and being a statutory tenant has no interest in the land, and is not a tenant at sufferance or at will. Denning L.J. (as he then was) refers to this situation as conferring "the valuable status of "irremovability[1]". It is well I think to dwell upon the way in which the Master of the Rolls defines the interest[2]: "the conception of a "statutory tenancy—the conception that a person may have such a "right of exclusive possession of property as will entitle him to bring "an action for trespass against the owner of that property but which "confers no interest whatever in the land: such a person is unable to "dispose of the land by grant or by testamentary disposition". For the purposes of this case, but with some diffidence having regard to the views of my colleague, I accept that the applicant had no estate or interest in the land in question, and that he had only a personal right to occupy, a right which conferred "the valuable status of irremov- "ability" and "a right of exclusive possession of property". Had I not felt persuaded by the authorities to make this acceptance then the matter could be neatly resolved as it is in the judgment of Black L.J.

It next falls to be considered whether such a right is one which is compensatable under the provisions of the relevant compensation provisions relating to compulsory acquisition of land.

It is important to examine this code of compulsory purchase in order to see what have been considered to be compensatable interests in the past.

This code begins with the Lands Clauses Consolidation Act, 1845, which, because of the great diversity of provisions relating to procedure for acquisition and compensation, was passed to provide a definite set of provisions which could be incorporated with or without modifications in subsequent special Acts authorising compulsory acquisition, and thus saving great trouble and expense. This Act by section 1 provides that except in so far as expressly excepted or varied the Act shall apply to every undertaking authorised by a statute subsequently passed which confers on the undertaking power to take land, and the Act is deemed to be incorporated in such Acts. It may well be that these words are sufficient to cause the terms of this Act to be incorporated in the Roads Act (Northern Ireland), 1948: see Cripps on Compensation, 10th ed. vol. 1, part 1, para. 624; and where this incorporation takes place the legal position is that the Lands Clauses Acts are to be followed unless the special Act by express words or necessary intendment varies or excepts them: *R. v. London*

[1] [1951] 2 K.B. at 506. [2] Ibid. 507.

Corporation[1]; *Weld v. South Western Railway Co.*[2]; *Metropolitan District Railway Co. v. Sharpe*[3]; Halsbury, Laws of England, 3rd ed., vol. 10, p. 20.

The Lands Clauses Consolidation Acts came to be modified in Ireland by a series of Acts called Railways Acts, being the Railways Act (Ireland), 1851, the Railways Act (Ireland), 1860, the Railways Act (Ireland), 1864 and the Railways Traverse Act, 1868. These Acts laid down in respect of railways a code for Ireland in place of that contained in sections 18 to 68 of the Lands Clauses Consolidation Act, 1845 as to the method of assessing compensation and the rules applicable thereto, and by the Interpretation Act, 1889, section 23(c) the phrase the "Lands Clauses Acts" as respects Ireland shall mean these Acts, together with the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation (Amendment) Act, 1860, and any Acts for the time being amending the same. This code could of course have been applied in Ireland to things other than railways if any particular Act had incorporated the "Lands Clauses Acts". The code so far as it concerns the actual assessing of compensation, as distinct from acquisition, was amended by the Acquisition of Land (Assessment of Compensation) Act, 1919.

The provisions of section 3 of the Railways Act (Ireland), 1851 enact that the clauses of the Act of 1845 "with respect to the purchase "and taking of lands otherwise than by agreement" except sections 16 and 17 shall not be applicable to railways in Ireland; this provision does not exclude the definition section viz. section 3 of the Lands Clauses Act, 1845, and by virtue of section 29 of the 1851 Act the said section is incorporated in the Railways Act; it thus seems to be quite clear that the definition of "lands" was the same at that time in England and Ireland and for this reason it would seem that the interests to which the Irish code related were no wider than the English code.

It now becomes necessary, therefore, to consider what were the compensatable interests under the Lands Clauses Acts, and I assume that they were the same under both the English and the Irish code.

What can be acquired and compensated for as lands under the provisions of the Lands Clauses Acts is defined in section 3 of the Act of 1845 as follows: "messuages, lands, tenements and hereditaments "of any tenure". These terms are to be found defined in the following way in Cripps on Compensation, vol. I, part I, para. 661: " 'messu-

[1] (1867) L.R. 2 Q.B. 292, 295.
[2] (1862) 32 Beav. 340.
[3] (1880) 5 App. Cas. 425.

" 'age' is substantially equivalent to house. In Co. Litt. 6a, n(2) it is "said that 'Tenement is a large word used to pass not only land and " 'other inheritances which are holden, but also offices, rents, " 'commons, profits a prendre out of lands, and the like, wherein a " 'man hath any possible tenement, and whereof he is seized "ut de " 'libero tenemento". But "hereditament" is the largest of all in " 'that kind, for whatsoever may be inherited is an hereditament, be " 'it corporeal or incorporeal, real or personal, or mixt'. And "Blackstone (Comm. Vol. 2, p. 12) says that 'Incorporeal heredita- " 'ments are principally of 10 sorts—advowsons, tithes, commons, " 'ways, offices, dignities, franchises, corrodies or pensions, annuities " 'and rents'. The words 'of any tenure' in section 3 however do not "limit the application of the definition of hereditaments to such "incorporeal hereditaments as are capable of tenure, but are to be "construed as meaning 'of whatever tenure, if any'; and so far as the "definition clause is concerned, lands, as there defined, include ease- "ments". Some light is thrown upon the interpretation of this definition by the case of *Great Western Railway Co. v. Swindon and Cheltenham Railway Co.*[1] where Lord Watson says: "Granting, "however, that the expression 'lands' in the Act of 1845 must, when "the terms and context of that Act are alone regarded, bear a more "restricted meaning than is assigned to it by the interpretation clause, "it does not follow that it must continue to have the same limited "meaning when its clauses are embedded in a context which en- "larges the scope of the general Act. When that Act is incorporated "with enactments which expressly confer upon the promoters power "to purchase and take incorporeal hereditaments by compulsion, I "think its clauses ought by virtue of their new context to be construed "so as to include and apply to hereditaments which are not corporeal. "It was, according to my apprehension, the purpose of the legislature "that the clauses of the General Act should be capable of expansion, "so as to apply not only to the cases contemplated by that Act, but "to all cases of purchasing and taking sanctioned by the provisions "of any of the special Acts with which they were in future to be "incorporated, subject, it may be, to the proviso that the words and "expressions occurring in these clauses were not to be extended "beyond the meanings severally assigned to them in section 3 of the "Act". Although Lord Watson's was a dissenting judgment it is on this point in agreement with the views of the rest of the House. Thus, it would seem that if the special Act had sanctioned the taking of e.g.

[1] (1884) 9 App. Cas. 787, 801.

a franchise of ferry, such an item could be the subject matter of compensation because the definition of "lands" in the Lands Clauses Act specifically mentions such rights and privileges. Such rights and privileges are not necessarily or at all interests or estates in land, but are analogous to licences. A franchise of ferry is a right to convey people by ferry and take a toll for doing so: *R. v. Cambrian Railway Co.*[1]; a market right "is, properly speaking, the franchise right of "having a concourse of buyers and sellers to dispose of commodities "in respect of which the franchise is given": see per Chatterton V.C. in *Marquis of Downshire v. O'Brien*[2]. approved of in *Scottish Co-Operative Wholesale Society v. Ulster Farmers' Mart Co. Ltd.*[3]. Supposing that a special Act was enacted which specifically gave (inter alia) power to acquire statutory tenancies would it, I wonder, be possible to say that such an interest was one which would fall within the definition of "lands" in section 3 of the 1845 Act? If such things as rights of markets, ferries and other incorporeal hereditaments as well as profits à prendre and tenancies at will are within the section it would not be astonishing if the right of a statutory tenant also fell within the definition—it would be surprising if it did not so fall. Yet, it would appear from the authorities and text books that the 1845 Act includes only land and estates and interests in land. Examples of rights which have been held not to fall within the definition of "lands" as contained in the Lands Clauses Acts are:

Licence to shoot over land: *Bird v. Great Eastern Railway*[4] (a case under the Lands Clauses Acts), and see the interesting paragraph on this point in Cripps 10th ed. vol. I, para. 2-021.

The exclusive right for a term of years to supply refreshments in a theatre and for that purpose to have the use of refreshment rooms, bars and cellars and a right to use space for advertisement: *Frank Warr & Co. Ltd. v. London County Council*[5]. Romer L.J. said in this case that a claim might lie for contravention of contractual rights, presumably between the parties to the contract.

A right to erect electric signs where no interest in the premises was given: *Walton Harvey Ltd. v. Walker & Homfrays Ltd.*[6]; and see Cripps, vol. I, p. 2,048. Held also in this case that a claim lay against the lessee for damages for breach of contract. See also *Magnet Advertising v. Arrowsmith*[7].

1 (1871) L.R. 6 Q.B. 422.
2 (1887) 19 L.R. Ir. 380, 390.
3 [1960] A.C. 63, 79: [1959] N.I. 46.
4 (1865) 34 L.J. C.P. 366.
5 [1904] 1 K.B. 713.
6 [1931] 1 Ch. 274.
7 (1938) 82 Sol. Jo. 911.

[And compare the cases of *Webber v. Lee*[1] (a right to shoot held to be an interest in land within the Statute of Frauds) approved by Lord Coleridge in *R. v. Surrey County Court Judge*[2] where it was held that a verbal agreement to let sporting and shooting rights was a right relating to land and triable by a jury in the county court. Neither of these two cases was under the Lands Clauses Acts.]

The position is shortly stated in Halsbury's Laws of England 3rd ed. vol. 10, p. 9 as follows: "Only persons having interests in the land "taken or affected are entitled to compensation. Persons who have "merely licences to use the land or premises have no valid claim. "Interests in chattels and personal rights confer no right".

Having regard to the foregoing matters it would seem that a statutory tenancy not being an interest or estate in land is not a compensatable interest within the Lands Clauses Acts and indeed this is so stated in Cripps on Compensation, 10th ed. at pp. 2,077 and 3,024 and in Megarry on the Rent Acts, 8th ed. p. 21. With these views I agree.

I should perhaps here point out that the definition of land contained in section 12(2) of the Acquisition of Land (Assessment of Compensation) Act, 1919, and which is as follows: "includes water "and any interests in land or water and any easements or right in, to "or over land or water", has no bearing on and does not extend the field of *acquirable* interests but merely puts the arbitrator in the position of being able to apply the rules for assessing compensation under that Act to all interests comprised in the definition of "land" in that Act, provided that power to acquire the particular interest can be found in the empowering Act. An example of such a case can be found stated in Cripps, vol. I, p. 1,585 where an interest in water was taken under a power to take in the Water Act, 1945, yet had the definition in the 1919 Act not included interests in water then the rules in the 1919 Act could not have applied to such an interest. Quaere, if an interest is taken under new legislation which interest is not strictly within the definition of land in the 1919 Act, could the rules of assessment be applied to such interest?

Having considered the position as it was under the Lands Clauses Acts it now seems desirable to look at the provisions of our modern code of compulsory acquisition by means of vesting order which came into existence for the first time in the Roads Improvement Act

[1] (1882) 9 Q.B.D. 315. [2] [1910] 2 K.B. 410.

(Northern Ireland), 1928. As, however, the definition of "land" under that Act could only be derived by reference to the Interpretation Act, 1889, section 3 and, as that definition does not, it seems to me, go beyond that contained in the Lands Clauses Acts I propose to pass on to a consideration of the rather more extended provisions for compulsory acquisition contained in the Local Government Act (Northern Ireland), 1934. This Act enabled compulsory acquisition to proceed by means of a vesting order, made by the Ministry of Health on application by a local authority, which becomes operative (unless challenged) at the expiration of three weeks from the date on which notice of its making is published: see section 22(2) (c) of the 1934 Act. The effect of such a vesting order when it becomes operative is that it vests "an estate in fee simple in the land to which it relates, "discharged from all claims, estates, incumbrances or charges whatsoever.... and the rights and claims of all persons in respect of "such land or any interest therein shall, as from the date of vesting, "be transferred and attached, to the extent to which compensation "may be payable in accordance with the provisions of this Schedule "....": see Second Schedule to the Act, article 6. The advantage of this method is that the acquiring authority may enter the lands and proceed with the purpose for which the land has been acquired as soon as the vesting order is made, and questions of compensation are left to be dealt with afterwards, whereas under the Lands Clauses Act, 1845, promoters could not enter the lands without consent until compensation had been agreed or awarded in each specific case and had been paid or deposited in a bank: see section 84. Where compensation had not been agreed or awarded then, unless with consent of the owners and occupiers, entry could not be made unless the special statutory conditions were fulfilled: section 85.

We may now look at the interests which may be acquired under the provisions of the Local Government Act (Northern Ireland), 1934. It provides in section 22(1) for the case where "(a) a county council "desire.... to acquire otherwise than by agreement any such land, "easements or rights over or in land, rights to water, or buildings as "are mentioned in subsection (1) of section ten of the Local Government (Ireland) Act, 1898".

The things mentioned in section 10(1) of the said Act of 1898 which may be acquired, purchased, taken on lease or exchanged are: "land or any easements or rights over or in land whether within or "without their county, including rights to water...." The word "land" is defined by the Interpretation Act, 1889, section 3, as in-

including messuages, tenements and hereditaments, houses and buildings of any tenure, and this would be the operative definition for the purposes of the Act of 1898. Thus there could be acquired or purchased compulsorily under section 22(1) (a)—messuages, tenements and hereditaments, houses and buildings of any tenure and rights over or in such subjects and easements; "or (b) a sanitary "authority desire.... to acquire otherwise than by agreement any "such lands or other properties as are mentioned in section two "hundred and two of the Public Health (Ireland) Act, 1878". That section of the Public Health (Ireland) Act provides that what may be purchased, taken on lease, sold or exchanged are "lands, whether "situated within or without their district.... water mill, dam, or "weir.... and.... any land covered with water or any water or "right to take or convey water".

By section 2 of the said Public Health Act "lands" are defined to "include messuages, buildings, lands, easements, and hereditaments "of any tenure". Thus there could be acquired or purchased compulsorily under section 22(1) (b) messuages, buildings, lands, easements, hereditaments of any tenure, water mills, dams, weirs, land covered with water or any water or rights to take or convey water. I should add here that the definition of lands in the Second Schedule of the Act of 1934 is the same as that in section 22, although the definition in the Schedule was extended by the Housing and Local Government (Miscellaneous Provisions) (Northern Ireland) Act, 1946, to include certain water rights. It will be seen that the phrase "rights over or in land" is not present in the description of the subjects which a *sanitary authority* may take compulsorily. Yet, it would appear that such "rights over or in land" as for example easements or profits à prendre are included in the phrase "messuages, "tenements and hereditaments" and thus both county councils and sanitary authorities may acquire compulsorily such interests as easements or profits à prendre. But it does not seem that a sanitary authority under the 1934 Act could acquire or purchase compulsorily whatever additional interests, if any, as are included under section 22(1) (a) in the phrase "rights over or in land"; such interests, it seems, in the case of a sanitary authority could only be acquired by agreement. It would do no violence, one would think, to the sense of the Act to suppose that the phrase "rights over or in land" could, and was intended to, include rights other than or different from easements and profits à prendre. It would also, in my view, be reasonable to construe it as a phrase which gives a wider power of compulsory

acquisition than that contained in the Lands Clauses Acts. How much wider, however, I am not prepared to define with precision.

But it does seem to me that if the Lands Clauses code regards as compensatable interests, as it does, easements, profits à prendre, tenancies at will and on sufferance, there would be no great novelty in admitting as a compensatable subject the occupation right and interest of a statutory tenant. It is right to bear in mind that by the year 1934 such right of a statutory tenant was one well known to the law, having been first created by the Rent and Mortgage Interest (Restrictions) Act, 1915. Viewing the matter in this way it does not seem to be an inadmissible use of language to say that the secure occupation right, the right to exclusive possession of a dwelling-house, which a statutory tenant enjoys is a right "over or in" land (land expressly including house) and would, therefore, be a right which a county council could acquire under section 22(1) (a), although perhaps, and I do not decide this, not acquirable by a sanitary authority under section 22(1) (b). It would undoubtedly be an anomaly if such a right was acquirable by a county council and not by a sanitary authority, but the different definitions of land could lead to this result.

This point of view can be put further when one looks at the Second Schedule to the Act of 1934 and examines the provisions relating to the "Appointment and Award of Arbitrator" and particularly to article 11 which provides for the making of "maps and schedules of "any lands to which the vesting order relates and lands injuriously "affected.... together with the names,.... of all persons.... "*interested in such lands* as owners or reputed owners, lessees or "reputed lessees, or *occupiers*".

As soon as the official arbitrator has been appointed these maps and schedules are delivered to him and notice of the appointment of the arbitrator and deposit of the maps at the office of the local authority is (inter alia) published by leaving a copy of the notice at each *house* to which the vesting order relates and sending a notice by post to all persons who, before the vesting order, were *interested* in the lands as owners or reputed owners, lessees or reputed lessees or *occupiers*. Thus the arbitrator would receive a schedule containing the name of the applicant in this case as a person who, prior to the vesting order, was *interested* in the land as *occupier*; the applicant would receive a notice at his house and one through the post.

It is of interest to note that article 2 required the notice of application for the vesting order to be given to the "owners, lessees and

"*occupiers*" of the land sought to be acquired. This, however, must have created practical difficulties where these persons could not be found and so by section 22(2) (a) of the Housing and Local Government (Miscellaneous Provisions) Act (Northern Ireland), 1946, there was substituted for the words "owners, lessees and occupiers" the words "persons appearing to the local authority to have interests in". This enabled the vesting order to be proceeded with more expeditiously.

There is some authority for holding that a "person interested in the "land as occupier" includes a statutory tenant. It is a decision of Barry J. in *Brown v. Ministry of Housing*[1], a case of compulsory acquisition under the English Acquisition of Land (Authorisation Procedure) Act, 1946, which Act by First Schedule, Part I, article 3(b), requires notice to be served on (inter alia) every owner, lessee and *occupier* (except tenants for a month or any period less than a month) of any land comprised in the order before the compulsory acquisition order is submitted for confirmation. This decision which incidentally contains a useful collection of the various terms in which judges have described the statutory tenancy is not binding on me, but I accept it as correct so far as it goes. The purpose of the notice, however, is merely to ensure that the persons served with it may be enabled to object to the order being confirmed. Barry J. held that a statutory tenant was an "occupier" within the meaning of the Schedule and in describing the interest of the statutory tenant he says[2]: "I think, using the word 'occupier' in its widest sense, that the "Rent Restrictions Acts do confer on a protected or statutory tenant "some interest in the premises which he occupies. As I say, it is an "interest which is purely the creature of statute, but it is there, and "it is, I am satisfied, an interest of very considerable value". The effect of this decision, I should note, has been nullified by the Housing Repairs and Rents Act, 1954, section 50(1), which provides that statutory tenants are deemed to be tenants for a period of less than a month.

One must recognise, as Barry J. does, that the word "occupier" may have to be qualified in some sense so as to exclude a servant, a trespasser or a squatter or some person who has no interest, to use that word in its widest sense, in the land.

I am prepared by reason of the considerations set out above to hold that a statutory tenant is, therefore, a person to whom the

[1] [1953] 2 All E.R. 1385. [2] Ibid. 1392.

compensation provisions of the Second Schedule apply and who is entitled to have his interest assessed to compensation. If he is such a person I can see no difficulty in holding that he is also a person who has an acquirable interest under section 22(1) (a) being a person who has a right over or in land (being a house). This may be, in a way, arguing backwards, but one must look at the whole Act and Schedule in order to elicit the meaning of the words used in its different parts and if the words of article 11 are wide enough, as I hold they are, to include a statutory tenancy this serves to confirm the view that I formed that the words "right over or in land" are wide enough to include such a tenancy.

At this point I think one must look back for a moment to section 4 of the Railways Act (Ireland), 1851. I have already said that I do not consider that that Act is any wider in its application than the Lands Clauses Acts as they apply in England, that is that it only includes land and interests and estates therein. It is right, however, to realise that the said section 4 which provides, in a rather similar way to article 11 of the Schedule to the 1934 Act, for the preparation of maps and schedules of the lands to be compulsorily acquired, and requires that there be set out in the schedules of such lands "the names of the "owners or reputed owners, lessees or reputed lessees, and occupiers "of the said lands....". Thus one might readily ask—if it is possible to hold that "occupiers of land" who must be set out in the schedules of names to be prepared under the provisions of the 1934 Act can include statutory tenancies and that they can be compensatable interests—is it not possible to hold that "occupiers of land" to be set out under section 4 of the Railways Act, 1851 include statutory tenancies as compensatable interests. The answer to this, as I see it, may be that the definition of "lands" under the Railways Act (which is the same as under the Lands Clauses Act) is not wide enough to include such an interest, whereas, as it seems to me, the definition of land under section 22(1) (a) by reason of the introduction of the words "right over or in land" is wide enough to include the right of a statutory tenant. When one is on this point it is important to point out that the provisions as to service of notices to treat is much more rigidly drawn in the Lands Clauses Act, 1845: see sections 18 and 19. It appears that service on an occupier can only take place when the parties interested in or entitled to sell the lands cannot after diligent inquiry be found or are absent from the United Kingdom. If no occupier can be found the notice shall be affixed on the lands. But what must be recognised here is that the service on the occupier is

only a method of substituted service on the owner permitted by statute: see *Shepherd v. Norwich Corporation*[1]. It is not a notice to treat given to the occupier because he has an interest in the land. Some occupiers might, of course, have interests in the lands and as such would be entitled to receive notice to treat under section 18. Notices to treat must be served generally on all parties necessary to convey all interests in the lands whether legal or equitable: see Cripps, 10th ed. vol. I, para. 2-012. Thus, for example, an occupier who is the type of tenant to whom section 121 of the 1845 Act applies, i.e. persons having no greater interest than from year to year, would appear to be entitled to a notice to treat under section 18.

I have now decided the narrow point as to whether a statutory tenancy is an acquirable and compensatable interest under the Act of 1934, but it does not decide whether, for example, the interest created by a mere licence agreement which gives, for instance, rights to erect and maintain signs, advertisements, poles and such like things on land is an acquirable and compensatable interest. Is, for example, the right of a person who has an agreement giving him the privilege of erecting an electric sign on an hotel as in *Walton Harvey Ltd. v. Walker & Homfrays Ltd.*[2] to be left in the same position here as he is in England? That is that he is held to have no proprietary interest or estate in the hotel, and that if an acquisition of the hotel takes place he is left with whatever contractual right he may have had against his "lessee" for damages for breach of contract. There may be something to be said for providing that such licences and privileges should be assessed to compensation by the tribunal which is dealing with the compensation for land and interests therein, although as in *Walton Harvey Ltd. v. Walker & Homfrays Ltd.*[2] the question of what was to be implied in the contract raised a question which would present some difficulty to a non-legal arbitrator. On the whole, however, it would seem to be desirable that such interests should be left to be dealt with in the same way as they are at present.

The operation of article 6 of the Second Schedule seems to me to be that whilst the land is swept clear of all "claims, estates, incumbrances or charges whatsoever" (phraseology which is probably wider than the words in section 22—the acquiring section) nevertheless "the rights and claims" which shall attach to the compensation fund shall be "in respect of such land or any interest therein" and

[1] (1885) 30 Ch.D. 553, 570. [2] [1931] 1 Ch. 274.

these rights and claims are in my view synonymous with those which may be acquired under section 22.

As I have already stated it is my view that a statutory tenancy is included; whether mere licences or other similar interests are also included I do not propose to decide. I think I should perhaps say that such a difficulty does not arise if the matter in issue is decided in the way set out by Black L.J. whose judgment I have had an opportunity of reading.

Bearing the foregoing considerations in mind one now comes to look at the provisions of the Roads Act (Northern Ireland), 1948. As I have already noticed section 34 of that Act gives power to purchase "land" compulsorily, and "land" as I have shown is defined in that Act as including "buildings and land covered by water, "and any estate or interest in land and any easement or right in, to or "over land or water". It cannot be supposed that this definition is intended to be narrower than that which is applicable under section 22(1) (a) of the Act of 1934 already referred to. Indeed, as will be remembered, that definition included "rights over or in land" whilst under the 1948 Act the parallel words are "rights in, *to* or over land"; the word "to" is an addition. It must also be observed that there is used for the first time in a definition of land the words "estate or "interest in land" and it then goes on to add to this "rights in, to or "over land". The latter words would appear to me to be wide enough to admit an interest which is not strictly an estate or interest in land yet could fairly be described as "a right in, to or over land" such as a statutory right to the exclusive occupation of a house including the right to quiet enjoyment in that house. That is, the right of a statutory tenant.

Furthermore, under article 10 of the Fifth Schedule of the Act of 1948, which requires maps and schedules of the lands to which the vesting order relates to be placed before the arbitrator, it is provided, as in article 11 of the Act of 1934, that such schedules shall contain the names "of all persons who immediately prior to the making of the "vesting order were *interested in such lands* as owners or reputed "owners, lessees or reputed lessees, or *occupiers*".

This provision, in my view, and for the reasons earlier stated in respect of article 11 of the Schedule to the Act of 1934, includes the interest of a statutory tenant.

Accordingly, I decide that the interest of the applicant is an acquirable and compensatable interest under the Act of 1948 and I would answer Question C.—"Yes". So far as assessing the compensa-

tion is concerned and the procedure relating to arbitration of such matters there can be little doubt that the Acquisition of Land (Assessment of Compensation) Act, 1919 would extend to cover any interest acquirable under the Act of 1948 because the definition of "land" in each Act is substantially the same.

As to the other questions raised I am satisfied that, firstly, no claim for disturbance can arise unless the applicant has a compensatable interest. This seems to be clear from *Horn v. Sunderland Corporation*[1]; *Venables v. Department of Agriculture for Scotland*[2]; and see also *Harvey v. Crawley Development Corporation*[3].

And, secondly, as to the principles applicable in the assessment of compensation, these appear to be set out in some detail in Cripps on Compensation, 10th ed. vol. I, part 4 and in particular under the heading "Losses included in Disturbance" at 4-229 see p. 4,162. I would refer also to the cases cited above, and in particular to *Harvey v. Crawley Development Corporation*[3], and I would suggest that the arbitrator with the help of counsel should apply the appropriate principles to this case.

I would say, however, that I am doubtful if the appropriate way of ascertaining the loss by reason of buying the alternative house is obtained by means of taking the interest on the capital outlay. Furthermore, the arbitrator should have regard to the fact that a statutory tenancy may be of limited duration. I would not answer Question E. but would leave the parties to come forward on any difficulty which may arise at the resumed arbitration.

Answers accordingly.

Solicitors for the applicant: *R. H. Orr & Sons.*

Solicitor for the Ministry: *G. D. Clarke.*

J.P.

1 [1941] 2 K.B. 26.
2 1932 S.C. 573.
3 [1957] 1 All E.R. 504.

McCANN v. ATTORNEY-GENERAL FOR NORTHERN IRELAND[1]

Northern Ireland—Constitutional law—Validity of statute—Statutory prohibition on persons who cannot satisfy certain conditions continuing to act as bookmakers—Loss of goodwill of bookmaking business—"Take any "property without compensation"—Compensation provided by later statute—Transactions between bookmaker and English firm—Whether "trade with any place outside Northern Ireland"—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 4(1) (7), 5(1)—*Betting and Lotteries Act* (*Northern Ireland*), 1957 (*c.* 19), *ss.* 5(1), 6(4)—*Finance* (No. 2) *Act* (*Northern Ireland*), 1957 (*c.* 24). *s.* 4(1).

By section 4(1) (7) of the Government of Ireland Act, 1920, the Parliament of Northern Ireland has no power to make laws in respect of trade with any place out of Northern Ireland, and by section 5(1) of the same Act it is prohibited from making a law so as either directly or indirectly to take any property without compensation.

The Betting and Lotteries Act (Northern Ireland), 1957, which was passed on July 29, 1957, legalised cash betting in Northern Ireland provided that bookmakers satisfied certain conditions. Section 1 requires every bookmaker to obtain a bookmaker's licence, and section 5(1) prohibits a licensed bookmaker from carrying on business as a bookmaker in any premises unless he holds a bookmaking office licence. Section 6, which came into operation on January 29, 1959, provides that a person who wishes to obtain a bookmaking office licence shall apply to a court of summary jurisdiction for a certificate of suitability, and by subsection (4) of that section a certificate of suitability shall not be granted in respect of any premises unless the applicant for such a certificate or his predecessor in title was on or before July 1, 1952, carrying on business as a bookmaker on those premises or on other premises from which such business had been transferred to those premises, or was on or before June 1, 1957, carrying on business on those premises exclusively as a credit bookmaker.

The Finance (No. 2) Act (Northern Ireland), 1957, came into operation on December 12, 1957, and by section 4 of that Act it was provided "(1) Where "a person satisfies a county court—(a) that he was, before the coming into "operation of section five of the Betting and Lotteries Act (Northern Ireland), "1957, lawfully carrying on a bookmaking business; and (b) that he is unable, "by virtue of the operation of subsection (4) of section six of that Act, to "carry on that business; the Ministry of Home Affairs shall.... pay to that "person compensation.... in respect of the business lawfully carried on "before the coming into operation of the said section five. (2) This section "shall be deemed always to have formed part of the Betting and Lotteries Act "(Northern Ireland), 1957, and to have come into operation on the passing "of that Act."

The plaintiff, a bookmaker whose business consisted mainly of cash

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Feb. 15, 16, 17, 18, Mar. 16, 1960.
In the House of Lords: Present—Viscount Kilmuir L.C., Viscount Simonds, Lord Radcliffe, Lord Denning, Lord Hodson: Jan. 11, 12, Feb. 1, 1961.

betting and who had not been carrying on business on his premises on or before July 1, 1952, brought action against the defendant seeking a declaration that section 6(4) of the Act of 1957 was invalid. The claim was based on two grounds: (a) that having regard to the relevant dates and the nature of his business the plaintiff was unable to bring himself within the requirements of section 6(4) and thus was precluded from carrying on his business in his present premises, and that accordingly the section had the effect, either directly or indirectly, of taking property belonging to him without compensation; (b) that as the plaintiff engaged in transactions with a company in England for the purpose of his business as bookmaker by way of buying information relating to horse racing and by way of laying off bets, the Act, in so far as it would preclude him from carrying on his business and engaging in these transactions with a company in England was "a law in respect of "trade with any place outside Northern Ireland."

Held, by the Court of Appeal (i) that the Betting and Lotteries Act (Northern Ireland), 1957, and in particular section 6(4) thereof, was not confiscatory in nature but was a truly regulatory provision and that accordingly there was no taking of property;

(ii) that assuming there had been a taking of property and it were necessary to provide compensation for the loss of a lawful credit bookmaking business which was segregable from an unlawful cash bookmaking business, such compensation was provided by the Finance (No. 2) Act (Northern Ireland), 1957, and it was irrelevant that this latter Act was passed subsequent to the earlier Act but before its relevant provisions came into force.

(iii) that on the evidence it appeared that the transactions alleged to constitute "trade with any place outside Northern Ireland" in fact took place in Northern Ireland between the plaintiff and the Belfast office of the English company, but even if the transactions had constituted "trade with any place "outside Northern Ireland" the effect of the legislation in question on such trade was merely incidental.

Gallagher v. Lynn [1937] A.C. 803 applied.

On further appeal to the House of Lords[1] *held*, affirming the decision of the Court of Appeal in Northern Ireland, that section 4 of the Finance (No. 2) Act (Northern Ireland), 1957, was effective to provide compensation for a lawful bookmaking business and that, consequently, it was unnecessary to consider whether "property" had been "taken" within the meaning of section 5 of the Act of 1920.

Per Lord Radcliffe. A law is "made" within the meaning of section 5 of the Act of 1920 when its relevant provisions can be invoked as a source of legal authority, as distinct from the moment when the words of a law qualify to be enrolled upon the statute book.

Appeal from an order of McVeigh J. dismissing an action in the nature of a test action for a declaration that the Betting and Lotteries Act (Northern Ireland), 1957, or alternatively, certain parts thereof,

[1] The point argued in the Court of Appeal on the effect of section 4(1) (7) of the Government of Ireland Act, 1920, was not pursued in the House of Lords.

is or are void by reason of sections 4(1) (7) and 5(1) of the Government of Ireland Act, 1920.

The following statement of facts is taken from the judgment of McVeigh J. in the Chancery Division: The plaintiff, James McCann, alleged that he had been carrying on the business of bookmaker on a cash and credit basis at 1A Essex Street, Belfast, since the year 1954, having then purchased the business for £147 from a Mr. Eastwood who formerly carried on a similar business at the said address.

When the plaintiff bought the business it was, to use his own words, a "very poor" one and had not any credit customers. The plaintiff became a weekly tenant of the premises in which the business was carried on until, by lease dated May 1, 1959, he took the premises for a term of 25 years expressed to commence on April 1, 1958. Mr. Eastwood had a telephone in the premises which the plaintiff "took "over" and in the year after he "took it over" he had his name inserted in the telephone book as the subscriber but retained the same number.

In March 1958 the plaintiff applied to the court of summary jurisdiction for a certificate of character pursuant to section 2 of the Betting and Lotteries Act (Northern Ireland), 1957, hereinafter called "the Betting Act", and was granted the same; he duly applied for a certificate of suitability to lead to the grant of a bookmaker's office licence pursuant to section 6 of the Betting Act, but such application was adjourned pending the outcome of this litigation.

In the course of his business the plaintiff used the services of a company called the London and Provincial Sporting News Agency, Ltd. which had its registered office at 27/28 Poland Street, Oxford Street, London, and which had also a Belfast branch office run by a local manager. McVeigh J. said that so far as the evidence went the company had not delivered to the Registrar of Companies in Northern Ireland, as required by section 299(1) (c) of the Companies Act (Northern Ireland), 1932, the name and address of a person resident in Northern Ireland authorised to accept service on behalf of the company of any process or notice, but that he was satisfied that the company was carrying on business in Northern Ireland at its branch office in Belfast. The news agency company supplied to its bookmaker customers racing information of the runners, any change of prices before races commence, the time when races commence, and gave the results and starting prices. It also supplied information as to the condition of the going and the weather. For this information the customer paid so much per day. In addition the company supplied

a "hedging" service which means that a bookmaker customer, if he is carrying too much money and does not wish to stand the amount himself, can pass on some or all of it to the company by way of a credit bet. Since 1954 the plaintiff was a customer of the company in respect of its information and "hedging" services.

So far as Northern Ireland customers were concerned they made their payments at the branch office in Belfast for services rendered. The information was distributed to the customers from this branch office, although the actual information came to the branch office from London via Liverpool.

Though when the plaintiff bought the business from Mr. Eastwood there were no credit clients, the plaintiff on the first day of the hearing of the case deposed that he had at that time, that is in 1954, some credit customers of his own, one of whom he named. He stated that he had books relating to the business, but that he had none in court; however, a book was produced which, it was averred, contained credit bets only; the first entry in this book was dated June 30, 1958, and the last was April 25, 1959. It was pointed out that the first entry in this book is dated 21 days after the writ in this case was issued.

The plaintiff was asked about his books for previous periods and he then said: "I usually do away with my books at the end of the "year." He stated that he had his income tax returns "back to the "start" and that he had books and documents at home. He stated that in the books he kept he distinguished between credit and cash bets but later he added that cash betting dockets are not entered in a book. He undertook to produce all books and documents on the second day of the hearing and on that day he produced one further book which appeared to relate to the period September 1957, to May 2, 1959, in which there were nine names recorded and which was stated to be a credit betting book only. He said that he, or the children, tore up the other books as "they were just rubbish," and so no other books were forthcoming. The items recorded in the two books, supposing that they all related to genuine credit betting transactions, amounted to £1,619 15s. 0d. for the book commencing September 1957, and £415 0s. 0d. for the book commencing June 30, 1958. It was not made clear whether these were gross takings without deduction of a figure for pay-out on winning bets, but it was clear that no element of expense has been deducted. The gross takings or profit for the year ended June 30, 1957, including cash and credit bets, amounted to £2,499 showing a net profit of £244 18s. 3d. For

the year ended June 30, 1958, the gross takings were £24,218 15s. 0d.; total pay-out was £22,503 0s. 0d. leaving a gross profit of £1,715 6s. 6d. with a net profit of £266 15s. 7d. and drawings of £312. His return of income to the Inland Revenue for the year 1958/1959 was £245. It would appear that the credit part of the business was small. The evidence also disclosed that an unspecified portion of the credit betting was transacted by the customers resorting to the plaintiff's premises and there laying bets in respect of which they did not or could not pay at the time. It was conceded that such bets would be unlawful.

McVeigh J. said that from his judgment of the three customers who gave evidence on behalf of the plaintiff, he would think that this unlawful type of credit betting preponderated in the small volume of credit betting carried on by the plaintiff. He said, further, that he found the evidence as to credit betting somewhat unconvincing, but that he was prepared to assume that the plaintiff would suffer some loss from cash and credit betting, although it might be very small in respect of the latter, if he were unable to obtain a licence to carry on a bookmaking office. He held that the business of those who could be referred to as post-1952 bookmakers, or some of it, would flow to and become part of the business of those bookmakers whom the Act permits to carry on. He refused the declarations asked for on the grounds that the Finance (No. 2) Act (Northern Ireland), 1957, provided compensation for lawful credit betting; that while there could be "property" in an unlawful business, and notwithstanding that the effect of the legislation was to take this property, it was not "property" within section 5, and the taking was regulatory; that the trade or business affected was not "trade or business with a place "outside Northern Ireland," and even if it were the effect was merely incidental. The plaintiff appealed to the Court of Appeal.

Lowry Q.C., *Hughes* and *Little* for the appellant. Section 6(4) of the Betting and Lotteries Act (Northern Ireland), 1957, is ultra vires the Parliament of Northern Ireland on two grounds—(i) it has the effect of taking the appellant's property without compensation contrary to section 5(1) of the Government of Ireland Act, 1920; and (ii) it involves a direct interference with the appellant's bookmaking relations with persons outside Northern Ireland contrary to section 4(1) (7) of the Act of 1920.

The facts found by the trial judge show that the appellant had a lawful credit bookmaking business; that he will lose this and that some of the business will be taken up by other bookmakers. The

Betting Act of 1957, containing as it does no provisions for compensation, was therefore invalid from the start, and the subsequent compensation provisions of the 1957 Finance Act cannot operate to validate the Betting Act retrospectively. In any event the Finance Act does not purport to provide compensation for a person in the appellant's position whose business has both lawful and unlawful elements, nor can it be made to do so by an application of the *Cannon Brewery* case[1] principle.

Section 6(4) takes away the goodwill of the lawful credit business of post-1952 bookmakers and at the same time in part enhances and in part creates the goodwill of pre-1952 bookmakers subject to the provisions of the Act. For this latter category the legislation is regulatory, but so far as those such as the appellant are concerned, i.e. those who are put out of business, it is definitely confiscatory. The result of the legislation is a transfer of goodwill from one category of bookmakers to another. It must be emphasised that what is taken is the goodwill, and not the use of certain premises.

The decision in *Ulster Transport Authority v. Brown*[2] that goodwill is property within the meaning of section 5 has not been affected by the decision of the House of Lords in *Belfast Corporation v. O. D. Cars, Ltd.*[3]. That most recent constitutional decision establishes (i) that "property" in section 5 is not confined to religious property; (ii) that the words "directly or indirectly" apply to the word "take" but their meaning is not further explained; (iii) that there may be a distinction between regulatory and confiscatory legislation and what is, on the face of it, regulatory, may be, in substance, confiscatory; (iv) that the pith and substance argument does not assist in construing section 5.

It may also be inferred from that decision that "property" may include tangible or intangible property, and that there is no real distinction between "take", "take over" and "take away." Those inferences are based on the fact that otherwise there would have been an immediate answer to the respondent's case, and also on the fact that Viscount Simonds[4] approved the Australian decision in *Minister of State for the Army v. Dalziel*[5].

In this case what the appellant had was "property" i.e. the goodwill of his lawful credit bookmaking business; it is certainly "taken away"

1 [1919] A.C. 744.
2 [1953] N.I. 79.
3 [1960] N.I. 60: [1960] A.C. 490.
4 [1960] N.I. at 88: [1960] A.C. at 519.
5 (1944) 68 C.L.R. 261.

if not actually "taken over"; the Act provides for no compensation, and even if this defect can be cured by the Finance Act, it does not apply to the appellant because of the existence of the unlawful side of his business. So far as the appellant is concerned the only effect of section 4 of the Finance Act is to show that Parliament recognised, to some extent, the deficiency in the earlier Act.

The fact that the appellant's business was tainted with illegality should not be allowed to weigh against him in determining his present rights: *Gordon v. Metropolitan Police*[1]. Bookmaking is a recognised trade, the profits of which are taxable: *Mann v. Nash*[2]; *Southern v. A.B., Ltd.*[3]; *Lindsay v. Commissioners of Inland Revenue*[4]; *Minister of Finance v. Smith*[5].

When considering the effect of section 5 of the 1920 Act it is most important to emphasise the words "so as to" as words importing consequence. The pith and substance doctrine is not applicable to legislation which is impugned under section 5: for the application of that doctrine see *Commonwealth of Australia v. Bank of New South Wales*[6]. It is alleged that the Betting Act, 1957, is a regulatory Act. That may be so in general but so far as section 6(4) is concerned it is confiscatory. Legislation which is prohibitory as regards the individual is bad, though it may be regulatory of a trade as a whole: *Hughes and Vale Proprietary Ltd. v. State of New South Wales*[7].

On the question of the legislation being ultra vires by reason of section 4(1) (7) of the 1920 Act, the learned trial judge could not have decided as he did had he given sufficient importance to the word "exclusively". He correctly assumed that the buying and selling of services could be "trade" within the meaning of section 4(1) (7), but erred in deciding that the trade carried on between the appellant and the news agency company was not trade with a place outside Northern Ireland. He also erred in holding that the effect of the Betting Act on this trade was "merely incidental" and that the complete stoppage of trade with post-1952 bookmakers was within the competence of the Northern Ireland Government.

Maginess, Q.C., A.-G., Nicholson, Q.C. and *McConnell* for the respondent. The Betting Act of 1957 has not the effect of "taking "property" within the meaning of section 5 of the 1920 Act, but even if it can be successfully argued that there was a "taking" and that what was taken was "property", the legislation is valid by reason of

1 [1910] 2 K.B. 1080.
2 [1932] 1 K.B. 752.
3 [1933] 1 K.B. 713.
4 (1933) S.C. 33.
5 [1927] A.C. 193.
6 [1950] A.C. 235.
7 [1955] A.C. 241.

the fact that compensation is provided for by section 4 of the Finance Act, 1957. That Act was passed after the Betting Act of the same year but before the relevant provisions of the Betting Act came into operation. Furthermore it is provided by subsection (2) of section 4 that the section "shall be deemed always to have formed part" of the Betting Act and "to have come into operation on the passing of that "Act." It is clear that an Act can be made to come into operation on a date earlier than that on which it is passed: see section 14 of the Interpretation Act (Northern Ireland), 1954, and see also per Lord Selborne in *Canada Southern Railway Co. v. International Bridge Co.*[1] and *Wilson v. Esquineaux Railway*[2].

It is not conceded that it was necessary to provide for compensation, nor that the intention of the Finance Act was to compensate all bookmakers who might be put out of business. The preamble to the Finance Act describes it, inter alia, as "An Act.... to provide for the "payment of compensation to certain persons affected by Part I" of the Betting Act. The long title of an Act of Parliament is to be read as part of the enactment: *Fielding v. Morley Corporation*[3]. It was never the intention of the Act to provide compensation for those who were, to all intents and purposes, carrying on an illegal business. In the case of the appellant it would be virtually impossible to distinguish between the almost non-existent credit betting and the illegal cash trade. The law does not protect those whose whole business is tainted with illegality: *Taylor v. Chester*[4]; *Woolf v. Freeman*[5]; *Reading v. Attorney-General*[6]. Even if section 5 of the 1920 Act could apply to this legislation, an illegal business cannot generate goodwill which is property.

As to statutory powers and legislation subject to conditions and exceptions see section 17 of the Interpretation Act (Northern Ireland), 1954, and per Lord Selborne in *Reg. v. Burah*[7].

Dealing with the argument on section 5 of the 1920 Act, it follows from the decision in *Belfast Corporation v. O. D. Cars, Ltd.*[8] that no "taking" was effected by this legislation. As a result of that decision the word "take" has been reduced so that it can no longer be said that a regulatory prohibition amounts to a taking. "Taking" in section 5 means "acquisition"; or if not acquisition in terms, the prohibition if it offends must go the length of achieving what

1 (1883) 8 App. Cas. 723, 727.
2 [1922] 1 A.C. 202.
3 [1899] 1 Ch. 1.
4 (1869) L.R. 4 Q.B. 309.
5 [1937] 1 All E.R. 178.
6 [1951] A.C. 507.
7 (1878) 3 App. Cas. 889.
8 [1960] N.I. 60: [1960] A.C. 490.

acquisition would achieve. It must be shown that the true nature of the legislation effects a "taking over". *Brown's* case[1] was correctly decided in the light of the *O. D. Cars* case[2] because there was in fact an intended transfer of the goodwill by the creation of a monopoly. The purpose of the legislation in this case was to control a certain category of persons and one of the effects, far from being a "taking", was the creation of rights in pre-1952 bookmakers which nobody had ever had before. The test of reasonableness, applied in some of the United States constitutional cases, may give rise to difficulty in some instances—see *Kruse v. Johnston*[3]—but it does not do so in this case.

It is argued on behalf of the appellant that the effect of the Betting Act in putting post-1952 bookmakers out of business involves, not regulation, but prohibition, and that consequently there is a taking. But the position is that if legislation is truly regulatory in its nature, then a merely incidental prohibition does not render the legislation offensive. In *Brown's* case[1], the transfer of the goodwill to the Ulster Transport Authority was not an incidental effect but was part of the whole intent of the Act. The principle is that the person challenging a statute which is intra vires on its face must show that it was enacted as part of a plan to effect indirectly something which the Legislature had no power to achieve directly: *Pillai v. Mudanayake*[4]. In regulatory legislation certain people may have to be excluded but as long as the legislation is not addressed to the exclusion of those people then it does not offend.

It is submitted that the right to trade is not "property" within the meaning of section 5. The word must connote something more than the mere enjoyment of property. There must be something in the nature of goodwill, and in this case there is absolutely nothing to show that the intention of the Act was to transfer the appellant's goodwill to other bookmakers. The effect is that the goodwill is dissipated and then in due course the trade which it represents will flow into the hands of others.

The appellant's argument that he is not entitled to compensation under section 4 of the Finance Act places him in something of a dilemma. This argument involves saying that he cannot get compensation because he was carrying on a mixed business while at the same time he is saying that the Betting Act is invalid because it deprives him of the goodwill of a lawful business. Either he had a lawful business and is entitled to compensation under section 4, or he had

[1] [1953] N.I. 79.
[2] [1960] N.I. 60; [1960] A.C. 490.
[3] [1898] 2 Q.B. 91.
[4] [1953] A.C. 514.

an unlawful business of which he cannot be heard to say that he has lost the goodwill.

Lowry Q.C. in reply. If section 6(4) of the Betting Act was bad from the start there was nothing upon which the Finance Act could operate. The position can be tested by considering what it would have been had the appellant brought an action for a declaration before December 12, 1957. Admittedly Parliament could have re-enacted the relevant parts of the Betting Act and put in a compensation section but that was not what was done. *Reg. v. Burah*[1] was referred to but that was a case involving subdelegation where there were full powers within a given field. It had nothing whatever to say to the problem of when an Act comes into effect or on the meaning of the words "make a law."

It was argued that the ratio decidendi of *Brown's* case[2] was that the purpose of the Transport Act, 1948, was to transfer goodwill. That reasoning does not appear from the judgments nor is it consistent with the words "so as either directly or indirectly to take...." in section 5 of the 1920 Act. It is agreed that since the decision in the *O. D. Cars* case[3] it is not sufficient to show merely that there has been a diminution of property rights, but section 5 definitely prohibits the bringing about of a certain result, viz. the taking of property. As to the arguments that "take" necessarily imports a transfer: see per Black L.J. in *Brown's* case[2] where he says[4]: "I cannot accept this "contention. In the first place I would be slow to hold that a taking "....necessarily involves the existence of a transferee." It is not conceded that it would be competent for the Northern Ireland Parliament to stamp out bookmaking altogether.

In short it is submitted (i) that the credit bookmaking side of the appellant's business is a lawful and severable trade; (ii) the goodwill or value of that business is property; (iii) section 6(4) takes and actually transfers that property (the taking would be sufficient to invalidate the legislation but there is also, in fact, a transfer); (iv) the Finance Act does not alter the position because (a) it has no effect on section 6(4) either generally, or, alternatively, as regards the appellant, and (b) on its true construction section 4 of the Act does not provide compensation for the appellant.

Cur. adv. vult.

1 (1878) 3 App. Cas. 889.
2 [1953] N.I. 79.
3 [1960] N.I. 60; [1960] A.C. 490.
4 [1953] N.I. at 128.

LORD MACDERMOTT, L.C.J.: The appellant carries on business as a bookmaker at 1A Essex Street, Belfast. He has been doing so since 1955 or 1954 at earliest. Most of the business done on these premises is cash betting, but it may be assumed, for the purposes of this appeal, that the appellant has also engaged in credit betting from the premises since before 1957. On any view, the volume of this part of the appellant's business is relatively small but, again for the purposes of this appeal, it may be assumed that it is segregable and could survive apart from the cash betting business. This seems a somewhat benevolent assumption on the evidence and I make it only for the purpose of keeping open the legal issues which were argued before us and have a general importance.

In effect, the appellant, by his present action, seeks to have section 6(4) of the Betting and Lotteries Act (Northern Ireland), 1957, (hereinafter called "the Act of 1957") declared invalid on two grounds—(1) that it is contrary to the restriction imposed by section 5(1) of the Government of Ireland Act, 1920, which prohibits the Parliament of Northern Ireland from making "a law so as either "directly or indirectly to.... take any property without compensa- "tion" and (2) that it is a law in respect of trade with a place or places outside Northern Ireland and is therefore beyond the competence of the Parliament of Northern Ireland having regard to the limiting provisions of section 4(1) (7) of the Act of 1920.

McVeigh J. held against the appellant on both these claims and dismissed the suit. In the course of a full and careful judgment the learned judge considered the facts and the relevant statutory provisions in detail and I do not propose to travel over this ground again save in so far as is necessary to indicate the issues for decision.

The use of premises for betting with persons resorting thereto has long been regarded as productive of some degree of public mischief and was forbidden in terms by section 1 of the Betting Act, 1853. Thereafter, the use of premises for cash betting or for credit betting involving resort to the premises was illegal and constituted a punishable offence. But credit betting which did not involve resort to the premises remained lawful and was greatly facilitated, as a social habit, by the invention and development of the telephone. As appears from its long title, one of the purposes of the Act of 1957ffices." "provide for the regulation of bookmakers and bookmaking o is "to This, to put it very briefly, has been done by setting up a licensing system whereby (a) all bookmakers must hold a personal licence, based on a certificate of character, and called a "bookmaker's

"licence"; (b) all premises used for carrying on the business of a bookmaker must have a "bookmaking office licence," based on a certificate of suitability; and (c) provision is made for an initial reduction in the number of premises used for betting and, thereafter, for keeping the number of licensed betting premises more or less constant.

The Act of 1957 provides penalties for acting as a bookmaker or using premises for bookmaking without the requisite licences. It does not repeal the Betting Act, 1853, but, by section 5(2), enacts that that Act shall not apply to premises licensed under the Act of 1957. One of the effects of this legislation, therefore, is to legalise bookmaking on licensed premises by licensed bookmakers, regardless of whether their business is cash or credit or both. Section 6(4) is intended to accomplish the initial reduction in numbers. This subsection (as amended in a manner which is not now material) provides that until March 31, 1962, a certificate of suitability shall not be granted in respect of any premises unless the applicant or his predecessor in title—(i) was on or before July 1, 1952, carrying on business as a bookmaker in those premises or in other premises from which such business has been transferred to those premises since that date; or (ii) was on or before June 1, 1957, carrying on business in the premises the subject of the application "exclusively as a credit "bookmaker."

The appellant possesses a bookmaker's licence, but he cannot bring himself within the requirements of section 6(4), having regard to the relevant dates and the nature of his business, and he is therefore precluded from carrying on the business of bookmaker in his present premises if that subsection is valid. I have already stated the grounds on which the appellant now contends it is invalid. Of these, it will be convenient to deal first with that relating to section 5 of the Government of Ireland Act, 1920.

That section was considered at length by this court in *O. D. Cars Ltd. v. Belfast Corporation*[1]. There, having stated our conclusions as to the scope and meaning of the expression "take any property" and having laid down a test for distinguishing a regulatory taking which would not contravene section 5(1) from one which would, we held that section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, was ultra vires because it committed an important element of this test to the decision of a department of the executive

[1] [1959] N.I. 62.

government. That decision has now been reversed by the House of Lords[1], but the judgment of McVeigh J., in the present case, was delivered while the appeal to the House of Lords was still pending. In this situation McVeigh J. applied the test thus laid down by this court, though the very different nature of the appellant's case made it unnecessary for him to consider the point on which the ruling of this court in *O. D. Cars Ltd. v. Belfast Corporation*[2] ultimately turned.

On this account, and also because each of the parties to the present appeal relied on certain views expressed by this court in that case, the opinions delivered therein, both here and in the House of Lords, were closely canvassed before us. I do not find it necessary, however, to approach the questions that now confront us from the point of view of what this court decided in *O. D. Cars Ltd. v Belfast Corporation*[2] and I think it is better to avoid such an approach. For one thing, I am very far from certain how much of the reasoning and conclusions (including what was said respecting the test mentioned above) of this court in *O. D. Cars Ltd. v. Belfast Corporation*[2] now remains; for another, it seems to me that the House of Lords has laid down a simpler criterion which is sufficient to dispose of all the appellant's contentions based on section 5(1) of the Act of 1920. I do not say this criterion will solve, or was meant to solve, all the problems that that subsection is capable of raising, but if appropriate in *Belfast Corporation v. O. D. Cars Ltd.*[2] it should be even more so in the present case which is less complex in that it deals not with an enablement but with a direct enactment, not with what a local authority or ministry may do, but with what Parliament itself had thought fit to provide. Adapting the words of Viscount Simonds[3], I therefore ask whether anyone using the English language in its ordinary signification would say of Parliament which imposed the restriction complained of by the appellant on the user of his premises, that it had "taken" his "property?"

In my opinion the answer to this question, as afforded by a study of the general intendment of the Act of 1957 as well as of the specific provisions which are now impugned, is clearly in the negative; and so much so that there is no need to apply any further test for the purpose of ascertaining if regulation here has gone the length of confiscation. As respects betting, the Act of 1957 had to meet a situation in which an illegal business, despite the statutory sanctions against it, was tending to spread, and had got mixed up with the business of credit betting which continued, whatever may be thought of the distinction,

[1] [1960] N.I. 60: [1960] A.C. 490.
[2] [1959] N.I. 62.
[3] [1960] N.I. at 85: [1960] A.C. at 517.

to be a lawful occupation. As we have seen, one of the steps taken was to reduce the number of betting premises by a procedure which appears to have been an application of the "last in first out" principle. It may be that other methods could have been employed, though it is unlikely that any of the courses open would have lacked objectors. But the question is not whether the method adopted was the best or the fairest means to the end which Parliament wanted to achieve; it is whether the challenged enactment is confiscatory rather than regulatory in nature. On this I entertain no doubt that it is a truly regulatory provision passed in the exercise of the power conferred by section 4(1) of the Act of 1920 to make laws for the peace, order and good government of Northern Ireland. If Parliament had thought fit to extend the prohibition of section 1 of the Act of 1853 to credit betting I do not see how it could possibly be said, despite the wider and deeper repercussions of such a measure, that its true nature was confiscatory and not regulatory: and if that be so, the much more circumscribed sweep of section 6(4) of the Act of 1957 cannot be thought to offend. On this broad ground, and without further scrutiny of the scope and meaning of the words "take" and "property", I would hold that section 5(1) has not been contravened.

That is enough to dispose of this branch of the case, but it is right I should notice a further line of argument which was considered at some length by McVeigh J. and supports the conclusion I have just stated. Like the appellant's business, it falls into two parts. The first relates to the cash betting business, and there it is said that the prohibition or denial of what is already prohibited cannot amount to a taking of goodwill or other form of property. The second relates to the lawful credit betting business, and there the contention is that, even if the stopping of such business constituted a taking of property, Parliament has provided compensation therefor.

I need say little about the first limb of this argument. I agree with the views expressed upon it in the court below. There is here no taking and, as McVeigh J. says in his judgment: ". . . . 'any property', "notwithstanding that the phrase is to be construed widely, does not "include an asset existing and continuing by the very doing of "unlawful and prohibited acts."

The second limb takes us to section 4 of the Finance (No. 2) Act (Northern Ireland), 1957, (hereinafter called "the Finance Act") a statute which received the Royal Assent on December 12 of that year. This section reads as follows: "(1) Where a person satisfies a

"county court—(a) that he was, before the coming into operation of "section five of the Betting and Lotteries Act (Northern Ireland), "1957, lawfully carrying on a bookmaking business; and (b) that he "is unable, by virtue of the operation of sub-section (4) of section six "of that Act, to carry on that business; the Ministry of Home Affairs "shall, out of moneys provided by Parliament, pay to that person "compensation, of such amount as the county court may determine, "in respect of the business lawfully carried on before the coming into "operation of the said section five. (2) This section shall be deemed "always to have formed part of the Betting and Lotteries Act "(Northern Ireland), 1957, and to have come into operation on the "passing of that Act."

Section 5 of the Act of 1957 is the section which prohibits the carrying on of the business of bookmaking on any premises without a bookmaking office licence. By the conjoint effect of section 36 of that Act and of S. R. & O. (Northern Ireland), 1958 No. 14, section 5 did not come into operation until April 1, 1958, that is to say, until after the Finance Act was passed and had come into force.

The appellant contended that the provision I have just set out conferred no right to compensation upon him for two reasons. In the first place, he said that if section 6(4) were, as he submitted, void, it fell out of the Act of 1957 and could no longer be regarded as part of that Act at any time for any purpose, with the result that its constitutional defects could not be repaired by subsequent legislation framed on the lines of section 4 of the Finance Act. I do not think this contention is sound. Section 4 of the latter Act was undoubtedly passed in order to make the right to compensation which it specifies a part of the earlier measure. The method it takes of doing this may be open to criticism, but I have no doubt of the competence of the Legislature to make good what was lacking in the earlier statute by a subsequent Act passed before the earlier statute came into effect. It could, for example, have set out an extended form of section 6(4), incorporating the provisions of section 4 of the Finance Act, in a schedule and enacted that the section so set out should be substituted for section 6(4) of the Act of 1957 and should be deemed always to have formed part of that Act. Parliament has not done this in terms, but I think what it has done amounts to the same thing. Section 4 of the Finance Act refers to section 6(4) of the earlier Act and must, in my opinion, be read as intended to operate thenceforward along with section 6(4) of the earlier Act as printed. I am therefore of opinion and hold that the Act of 1957 must, for the

purpose of this appeal, be read as containing at the time when section 5 of that Act came into operation the compensatory provisions of section 4 of the Finance Act.

The second point made by the appellant was that even if section 4 of the Finance Act could be read into the text of the earlier Act its terms were, nevertheless, insufficient to give him a right to compensation since, on its true construction, paragraph (a) of subsection (1) of that section relates only to a bookmaker who before the relevant date was carrying on a bookmaking business which was entirely lawful, and does not, therefore, apply to the appellant, whose business is a mixed business, partly lawful and partly not. In my opinion this is not the proper construction of paragraph (a). If a bookmaker carries on a bookmaking business which consists partly of cash betting and partly of lawful credit betting I do not see why, if the two activities can be segregated, the paragraph should not operate on the lawful activity. If Parliament had intended to deny compensation to a bookmaker who carries on a lawful bookmaking business simply because he also carries on a segregable cash betting business, I think it would have said so in clear terms. Of course, if the whole business is so mixed up that the two elements cannot be segregated section 4 of the Finance Act could not be applied. That, however, does not further the appellant's argument, for on that hypothesis nothing capable of being taken, and made the subject of compensation, could be identified.

Turning from the general to the particular, I should perhaps observe that the Attorney-General took a somewhat guarded view of this aspect of the appellant's case and would not concede that he had any good claim to compensation under the Finance Act. His whole business, according to the Attorney-General's submission, was tainted with the illegality of the cash betting. On the view I have expressed I do not think this can mean more than that the appellant's credit business is not segregable. I am not to be taken as expressing any conclusion on that. For the purpose of the constitutional issues with which we are dealing I have assumed that the appellant's credit business is segregable and I need not go further. If segregable, section 4 of the Finance Act gives him, in my opinion, a right to compensation which would steer the legislation clear of section 5(1) of the Act of 1920, even if that restriction were otherwise applicable. And if not segregable, the appellant's case stands no higher as respects his credit betting business than it does as respects his cash betting business.

Coming to the second branch of the claim, I must now refer to the appellant's contention that the legislation he challenges is bad because it is precluded by section 4(1) (7) of the Act of 1920. The learned trial judge found against the appellant on this issue—firstly on the ground that the trade which would be disrupted or injuriously affected, if the appellant were put out of business as a bookmaker, was not trade with any place out of Northern Ireland but was trade carried on between the appellant and the Belfast office of an English company; and secondly on the ground that even if the trading in question were a trading with any place out of Northern Ireland the effect of the legislation upon it was merely incidental and not such as to bear upon the validity of what had been enacted, having regard to the decision of the House of Lords in *Gallagher v. Lynn*[1]. In my opinion the learned judge was clearly right on both these points and he has dealt so fully with them that I do not think there is anything I can usefully add to what he has said.

For these reasons I am of opinion that the legislation attacked by the appellant is good and that his appeal should be dismissed.

BLACK L.J.: I agree entirely with the judgment which has just been delivered by the Lord Chief Justice, and have nothing to add to what he has said.

CURRAN L.J.: I agree that the appeal should be dismissed.

In *Ulster Transport Authority v. James Brown & Sons, Ltd.*[2] I expressed the opinion that a person by the exercise of a right to carry on a trade might build up something of value based upon and dependent upon the continuance of his right to carry on his trade. In the present case the evidence does not disclose that the appellant had a credit betting business of any value, and I have no difficulty in agreeing that section 6(4) of the Betting and Lotteries Act, 1957, has not the effect of taking property from the appellant within the meaning of section 5 of the Government of Ireland Act, 1920. If on further investigation it is found that appellant had a credit betting business of any value I agree that section 4 of the Finance (No. 2) Act, 1957, provides for compensation.

Appeal dismissed.

S.M.M.

[1] [1938] N.I. 21: [1937] A.C. 863. [2] [1953] N.I. 79, 100.

The plaintiff appealed to the House of Lords[1].

Hughes Q.C. (of the English Bar), *Lowry Q.C.* and *Little* (both of the Bar of Northern Ireland) for the appellant.

Maginess Q.C., *A.-G.*, *Nicholson Q.C.* and *McConnell* (all of the Bar of Northern Ireland) for the respondent.

Their Lordships took time for consideration.

The Lord Chancellor (read by Viscount Simonds): My Lords, this is an appeal from the Court of Appeal of Northern Ireland in which that court dismissed the appellant's appeal from the judgment of McVeigh J. in favour of the respondent in an action in which the appellant was plaintiff and the respondent defendant.

In that action the appellant claimed that the Betting and Lotteries Act (Northern Ireland), 1957 (which I shall call "the Betting Act") or alternatively certain provisions thereof, has or have the effect of directly or indirectly taking property of the appellant without compensation and accordingly is or are void, ultra vires and beyond the powers of the Parliament of Northern Ireland in so far as the effect is contrary to the restrictions imposed by section 5(1) of the Government of Ireland Act, 1920. There was also a claim that the law was void under section 4 of that Act as being in respect of trading with a place or places outside Northern Ireland. Neither this nor a further claim based on the creation of an unlawful monoply were pressed before us.

The relevant provision of the Government of Ireland Act, 1920, is: "5. (1) In the exercise of their power to make laws under this Act.... "nor the Parliament of Northern Ireland shall make a law so as either "directly or indirectly to.... take any property without compensa- "tion. Any law made in contravention of the restrictions imposed by "this subsection shall, so far as it contravenes those restrictions, be "void."

The factual basis of the appellant's claim was, first that he is a licensed bookmaker within the meaning of the Betting Act, and secondly that his bookmaking business at 1A Essex Street, Belfast, consisted of activities both as a cash and a credit bookmaker and that the legal portion of that business which is limited to credit bookmaking with persons not resorting to the premises was sufficient

[1] This case, in the House of Lords, is reported *ex relatione* D. J. Little, junior counsel for the appellant, and the speeches are printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

to constitute property within the section of the Government of Ireland Act which I have just quoted. On that basis he claimed that section 6(4) of the Betting Act, combined with section 5(1) of the same Act to which I shall later refer, had the effect when enacted of taking that property of the plaintiff—namely, his business so far as the same was lawful, together with the goodwill of the business and the right to carry on such lawful business—without compensation. This in turn involved a second question concerning section 4 of the Finance (No. 2) Act (Northern Ireland), 1957 (to which I shall refer as "the Finance Act"). That section purported to give compensation in certain cases affected by section 6(4) of the Betting Act. It was claimed that it could not retrospectively validate section 6(4) and cure the defects of the Betting Act in its application to the appellant.

The evidence put forward to establish the factual basis, which is set out with, if I may say so, great care and particularity in the judgment of McVeigh J., was scrappy and unsatisfactory. If one takes the most beneficent view from the standpoint of the appellant, it is difficult to see how his credit betting was much more than 5 per cent. of his turnover. When one seeks to segregate the legal credit betting, one is left with these words of McVeigh J.: "I cannot quantify the "amount of these" (customers going to the plaintiff's premises and there making credit bets) "but from my judgment of the three "customers who gave evidence on behalf of the plaintiff, I would "think that this unlawful type of credit betting preponderated in the "small volume of credit betting carried on by the plaintiff."

Moreover, there was no separation or distinction of the lawful credit betting from the unlawful betting. Cash, unlawful credit and the small trickle of lawful credit betting together constituted one business. Not only was the lawful betting not in fact segregated but it is difficult to see how it could be as the business was conducted. On that state of the evidence I have great difficulty in seeing how the appellant had a lawful credit business of any value and how in these circumstances he establishes the first step in his argument that the lawful credit business of the appellant and the goodwill thereof constitute property within the meaning of section 5(1) of the Act of 1920. The argument that the business of illegal betting was property was not advanced to us.

However, the courts below were prepared to assume that the appellant would suffer some loss from the stoppage of the lawful part of his business and considered the statutory points on that assumption. I therefore proceed to do the same.

The Betting Act, described as "An Act to provide for the regulation "of bookmakers and bookmaking offices," was passed on July 29, 1957. The first four sections are concerned with the licensing of bookmakers and deal with the obtaining of a licence for "on the "course" bookmaking and the prohibition of carrying on business as a bookmaker without such a licence. The Act then turns in sections 5 to 8 to the "Licensing of Bookmaking Offices." Section 5 provides that a licensed bookmaker shall not carry on business as a bookmaker in any premises unless he holds a "bookmaking office licence" issued to him by a court of summary jurisdiction under section 8, permitting him to carry on that business in specified premises. Section 6 provides that any individual who desires to obtain a "bookmaking office "licence" may apply in accordance with that section to a court of summary jurisdiction for "a certificate of suitability" that the premises in which he intends to carry on business as a bookmaker are suitable for the purpose. Subsection (4) of that section provides that until March 31, 1960 (afterwards amended to 1962), the court shall not grant a certificate of suitability of any premises unless the applicant for such certificate or his predecessor in title was, on or before July 1, 1952, carrying on business as a bookmaker in those premises, or in other premises from which such business has since that date been transferred to those premises or was on or before June 1, 1957, carrying on business in those premises exclusively as a credit bookmaker. Section 7 deals generally with the grounds for refusal of a certificate of suitability of premises.

I now turn to the important provisions for bringing the Act into force contained in section 36. Subsection (2) provides that this section itself should come into operation on the passing of the Act and that the other provisions of the Act should come into operation on such day or days as the Minister of Home Affairs might by order appoint. That Minister, by the Betting and Lotteries Act (Northern Ireland), 1957 (Date of Commencement) Order, 1958, appointed January 29, 1958, as the date for the coming into operation of sections 2 and 6, and April 1, 1958, for the coming into operation of sections 1 and 5.

Before either of these dates, namely, on December 12, 1957, the Finance (No. 2) Act (Northern Ireland), 1957, became law. Section 4(1) of that Act provides that where a person satisfies a county court —(a) that he was, before the coming into operation of section 5 of the Betting Act, lawfully carrying on a bookmaking business, and

(b) that he is unable, by virtue of section 6(4) of that Act, to carry on that business, the Ministry of Home Affairs shall, out of monies provided by Parliament, pay to that person compensation, of such amount as the county court may determine, in respect of the business lawfully carried on before the coming into operation of section 5 of the Betting Act. Subsection (2) of the same section provides: "This "section shall be deemed always to have formed part of the Betting "and Lotteries Act (Northern Ireland), 1957, and to have come into "operation on the passing of that Act."

In spite of these provisions for compensation the appellant argues that the effect of section 5(1) and section 6(4) of the Betting Act was, on the passing of that Act, to give the Minister authority immediately to appoint a day for their commencement, thus to deprive the appellant of his lawful credit business and its goodwill and so to take property of the appellant without compensation. The argument continues that section 4(2) of the Finance Act did not validate section 6(4) of the Betting Act in its application to the appellant for two reasons—(1) As section 6(4) combined with section 5(1) of the Betting Act had the effect of taking property of the appellant without compensation it was therefore void in relation to the appellant at the time of its enactment. Accordingly the appellant was not "unable by "virtue of section 6(4)" of the Betting Act to carry on his business and so section 4(1) (b) of the Finance Act would not apply to him. (2) As the appellant was carrying on a business comprised of lawful and unlawful elements he will be unable to satisfy the court that he was "lawfully carrying on a bookmaking business."

The basis of this argument is that by the month of December, 1957, when the Finance Act was passed, section 6(4) had effectively ceased to be part of the Betting Act at least in relation to the appellant by reason of section 5(1) of the Government of Ireland Act and that section 4 of the Finance Act did nothing to revive its effect.

I cannot accept this argument. Section 5(1) of the Government of Ireland Act forbids the making of a law whose result is to take property without compensation. I cannot construe that as making it impossible by a second Act to add the necessary provisions to the first Act before that Act comes into operation. The learned Lord Chief Justice of Northern Ireland suggested that the Parliament of Northern Ireland could have set out an extended form of section 6(4) of the Betting Act incorporating the provisions of section 4 of the Finance Act in a schedule and enacted that the section so set out should be substituted for section 6(4) of the Act of 1957, and should

be deemed always to have formed part of that Act; and that what Parliament has done amounts to the same thing, for section 4 of the Finance Act must be read as intended to operate from the time of its passing along with section 6(4) of the Betting Act. I respectfully agree. I think that it would be most undesirable for the courts to avoid legislation when a flaw has been corrected before the Act has been brought into operation, and before it could have had any result.

As to the contention that the compensation provisions do not cover a business composed of lawful and unlawful parts, I must pause for a moment to note that the appellant is at one and the same time contending that there is a sufficient lawful business to constitute "property" within section 5(1) of the Government of Ireland Act, but that he is not lawfully carrying on a bookmaking business within section 4(1)(a) of the Finance Act. I return, however, to what appears to me the relevant point. Compensation is provided by the statute for anyone who proves that he was lawfully carrying on a bookmaking business. If he fails because he cannot disentangle and segregate the lawful part, then it is no reason for avoiding the Act because it does not give compensation for the rewards of what must be calculated illegality.

The view that I have taken of what I may term the statutory contention makes it unnecessary for me to say whether there has been a "taking" within section 5(1) of the Government of Ireland Act.

I would dismiss the appeal.

Viscount Simonds: My Lords, the appellant is a Belfast bookmaker. On June 9, 1958, he issued a writ against the respondent, Her Majesty's Attorney-General for Northern Ireland, by which he claimed a declaration that the Betting and Lotteries Act (Northern Ireland), 1957, or alternatively certain provisions thereof, (a) has or have directly or indirectly the effect of taking property belonging to him without compensation and (b) is or are accordingly void. His claim was founded on section 5 of the Government of Ireland Act, 1920, which, as I remind your Lordships, provided that the Parliament of Northern Ireland should not exercise its legislative power so as (inter alia) to take any property without compensation and that any law made in contravention of that restriction should, so far as it contravened it, be void.

It became then the task of the appellant to show that it was the effect of the Act to which I first referred, "the Betting Act", as I will

call it, first, to take his property, and, secondly, to take it without compensation. It was, in my opinion, a task in which he could not hope to succeed. I have grave doubts whether upon the facts he ever reached the point at which any legal argument was open to him, but, if I make the same generous assumption as was made in the courts of Northern Ireland, I am satisfied that he must fail in his claim.

The appellant, as I have said, is a bookmaker. He carries on his business at 1A Essex Street, in the City of Belfast, and has done so since 1955 or at the earliest 1954. These dates are important. He has carried it on almost entirely in an illegal manner. By far the greatest part of his custom has been cash betting, an offence against the Betting Act, 1853, and of the rest, a substantial proportion has been credit betting by customers resorting to his premises, equally an offence against that Act. The negligible remainder was credit betting by customers who did not resort to his premises. This alone was legal. The exact amount was not discoverable. His books, if they could be called books, were not adapted to discovery.

It is in the light of these facts that the provisions of the Betting Act and certain subsequent Acts have to be considered.

The Betting Act is described by its long title in the first place as an Act to provide for the regulation of bookmakers and bookmaking offices. By section 1 provision is made for the prohibition of any person acting as a bookmaker without a licence and by section 2 for the acquiring of a certificate of character by a person wishing to obtain a licence; section 3 states the reasons for refusal of such a certificate; section 4 provides for the issue of a bookmaker's licence and enacts that it shall entitle the holder to carry on the business of bookmaking only at a horse or dog race-course meeting or at a recognised point-to-point or coursing meeting. Sections 5 and 6 are our immediate concern. Section 5 enacts that a licensed bookmaker shall not carry on business as a bookmaker in any premises unless he holds a valid and subsisting licence, referred to as a "bookmaking "office licence" issued to him under section 8 of the Act permitting him to carry on that business in those premises, and that the Betting Act, 1853, shall not apply to any premises in respect of which such a licence is in force. Section 6 by subsection (1) provides for the application by a person who wishes to obtain such a licence for a certificate (called a "certificate of suitability") that the premises in which he intends to carry on business as a bookmaker are suitable for the purpose and by subsection (4) that until March 31, 1960 (which was by the Betting and Lotteries (Amendment) Act (Northern Ireland),

1959, extended to March 31, 1962) a certificate of suitability should not be granted of any premises unless the applicant for such certificate or his predecessor in title was on or before July 1, 1952, carrying on business as a bookmaker on those premises or in other premises from which such business had since that date been transferred to those premises, or was on June 1, 1957, carrying on business in those premises exclusively as a credit bookmaker. Section 7 prescribes the further grounds on which a certificate of suitability of premises might be refused and section 8 provides for the due issue and duration of bookmaking office licences.

From what I have said it is clear that the appellant was debarred by the terms of section 6(4) of the Act from obtaining a certificate of suitability for his premises, 1A Essex Street, at any rate until March 31, 1962.

By section 36(2) of the Act it was provided that the Act should (so far as relevant) come into operation on such day or days as the Minister of Home Affairs might by order appoint. He duly appointed January 29, 1958, as the date for coming into operation of sections 2 and 6 of the Act and April 1, 1958, as the date of coming into operation of sections 1 and 5. These dates also are important. For by the Finance (No. 2) Act (Northern Ireland), 1957, which became law on December 12, 1957, it is provided by section 4 that where a person satisfies a county court (a) that he was before the coming into operation of section 5 of the Betting Act lawfully carrying on a bookmaking business and (b) that he is unable by virtue of section 6(4) of that Act to carry on that business, the Ministry of Home Affairs shall, out of monies provided by Parliament, pay to that person compensation of such amount as the county court may determine in respect of the business lawfully carried on before the coming into operation of section 5.

My Lords, logically it should first be asked what property has been taken from the appellant by the coming into operation of section 5 of the Betting Act. That is a question which the noble and learned Lord on the Woolsack asked, which indeed we all asked, during the course of the argument, but to which we got no satisfactory answer. Learned counsel naturally shrank from saying that the "property" consisted of the business illegally carried on by the appellant or the goodwill thereof. He therefore said that it consisted in that part, a negligible part as I have said, of the business which was lawful, and that which had been taken away was the right to carry on that part of the

business or, alternatively, to dispose of it by sale. In the recent case of *Belfast Corporation v. O. D. Cars Ltd.*[1] there was much discussion of the meaning of the relevant words. I will not traverse that ground again except to say that it appears to me that there can in this case be only one answer to the pertinent question which the learned Lord Chief Justice cited from my speech in that case. I do not think it necessary to do so nor to pursue the elusive or often illusory distinction between regulatory and confiscatory measures because, whatever view may be taken of the question in its application to section 5 of the Betting Act, the appellant must fall down on the second branch of the case. For even if he satisfies the House that the section operates so as to take his property he must still establish that it is taken without compensation. In other words, he must show that the Finance (No. 2) Act, 1957, does not provide the relevant compensation. His main contention is that the validity of section 5 of the Betting Act must be determined at the date of the passing of the Act, that is, July 29, 1957, and that if it was then void, it cannot be given validity by a subsequent Act, and he says that this is so even though the operation of the section that he attacks was by section 36(2) deferred until a day to be appointed by the Minister and the day in fact so appointed was later than the date of operation of the Finance Act. I agree with the learned Lord Chief Justice in thinking that this is altogether too narrow a view. Granting that the Parliament of Northern Ireland is what is sometimes called a subordinate Legislature with restricted powers of legislation, I see no reason to doubt its competence to make good by a later Act any defect, if there be a defect, in an earlier one, and in effect to provide that the earlier Act is to be read as if the provisions of the later Act were incorporated in it. Nothing that was said in the *Ottawa Schools* case[2], upon which the appellant relied, is inconsistent with this view.

But then it was urged that, even if the provisions of the Finance (No. 2) Act, 1957, reinforced those of the Betting Act, yet no compensation was provided for the particular case of the appellant. This, my Lords, is an extraordinary argument. The Act provides compensation of such amount as the county court may determine "in respect of the business lawfully carried on before the coming into "operation of the said section 5". That, says the appellant, is not good enough for him. Yet he cannot surely ask for compensation in respect of a business unlawfully carried on. It would be reasonable, therefore, for him to urge that the section meant that, in so far as the

[1] [1960] N.I. 60; [1960] A.C. 490. [2] [1917] A.C. 62.

business was lawful (that is, credit betting by persons not resorting to the premises), he was entitled to compensation. But he appeared to argue, no doubt in order to establish that section 5 was void, exactly the contrary. He disclaimed the applicability of the section to himself, urging that he had not carried on a lawful business within its meaning. It may be—I hinted at this at an early stage of this opinion—that so much of his business was unlawful, so little of it lawful and that little impossible to segregate from the unlawful, that a county court would come to the conclusion that he had no lawful business in respect of which compensation should be given. But that does not mean that section 5 of the Government of Ireland Act has been infringed. It only means that the Betting Act read with the Finance (No. 2) Act, 1957, does not provide compensation for the discontinuance of an unlawful business. No reason has been advanced why it should or why, if it fails to do so, it should be pro tanto void.

This is sufficient to dispose of the appellant's claim which is wholly without merit.

The appeal should, in my opinion, be dismissed with costs.

Lord Radcliffe: My Lords, I should suppose that there is more than one ground which would make it necessary to dismiss this appeal. I think it better, however, to confine myself to that which seems the simplest and shortest, namely, that, if the Betting and Lotteries Act (Northern Ireland), 1957, is taking any property within the meaning of the Government of Ireland Act, 1920, it does not do so without compensation. If that is right, as I am clearly of opinion that it is, it does not matter whether on the facts adduced in this particular action the appellant himself had or had not anything that can be called property in that sense: nor is it necessary to discuss the permissible limits of the word "property" in this connection.

I think that the method of dealing with the case in the courts below has made it difficult for us to take any other course. I cannot feel altogether satisfied with that method. The whole purpose of the action was to obtain from the court a declaration that the Betting Act or, at least, certain parts of it, were void in law. Putting aside two special arguments based on section 4 of the Act of 1920 (trade with a place or places outside Northern Ireland) and on an alleged unlawful monopoly, the burden of Mr. McCann's case was that at the date of the Betting Act coming into force he owned "property" which was taken under the Act without compensation. It is obvious that unless

he did have some such property he at any rate could not obtain any such declaration: and it seems to me that the court was therefore bound to come to a positive conclusion on this first question before it could deal adequately with general questions as to the nature of the Betting Act and the interpretation and effect of section 5 of the Act of 1920.

This unfortunately was not done. If Mr. McCann had any property taken by the Betting Act it can only have been some sort of goodwill, allowing that word to be used in the very wide sense of the establishment or organisation value of assets assembled for the purposes of business. Did Mr. McCann possess any such goodwill at all? That is a question of fact which ought to have been determined by the learned judge who tried the action in the High Court. But it never was explicitly determined. Pretty well the whole business, on the evidence, consisted in a regular course of law-breaking: I do not think that there can be any goodwill in such a business which can be recognised by the law. There was some evidence, not at all satisfactory evidence, that in his business Mr. McCann did not always do everything contrary to the law and that occasionally a bet was placed for credit on the telephone. Could this create a lawful branch of his business with, conceivably, a goodwill of its own which the law could recognise as property under the Act of 1920? One can recognise the possibility of such a segregation, if the facts of a particular case are sufficiently strong to support it, but my difficulty is that on the facts as found by the learned judge I cannot say conclusively whether the present was or was not one of those cases. I most strongly suspect that it was not. So, I think, did the learned judge. But, instead of deciding this issue, he seems to have been ready to assume that the plaintiff had a *locus standi* as an owner of property. The same assumption was made by the Court of Appeal—as they say, a "somewhat benevolent assumption". I do not myself think that such a question ought to be dealt with by way of assumption where so grave an issue as the validity of an Act of Parliament and the consequent declaration of general right is dependent upon it. Taking this view, I think that the only really satisfactory way of disposing of the appeal in the form in which it reaches us is to direct oneself to the simple question whether the Act of 1957 is in any event to be regarded as a statute which legislates for the taking of property without compensation.

As to this, as I have said, I am quite clear. I have no doubt that the compensation provisions contained in section 4 of the Finance

(No. 2) Act (Northern Ireland), 1957, are to be treated as part of the Betting Act for all relevant purposes. As subsection (2) of section 4 of the Finance Act says, the section is to be "deemed always to have "formed part of" the Betting Act and to have come into operation on the passing of the Act. Consequently, whatever "taking of property" is affected by virtue of the provisions of the Betting Act, it is at any rate not a taking without compensation.

The Finance Act came into operation on December 12, 1957. The material sections of the Betting Act, as we know, were not brought into operation (under Ministerial Order) before January 1958. The appellant is therefore compelled to argue that the compensation section introduced by the Finance Act should never have any legal effect because the parts of the Betting Act which authorised a "taking "of property" were a nullity as soon as the Act was passed on July 29, 1957, there being at that date no compensation provisions in existence. According to this argument there was nothing to which those provisions when added by the Finance Act could attach.

I regard this as an unmaintainable proposition. Section 5 of the Act of 1920 is a constitutional limitation of considerable importance and its legal impact upon the exercise of legislative power in Northern Ireland must be judged by measuring the results of an attempted exercise of that power, not by any niceties in the formalities of law-making. The prohibition is against making a law "so as.... to take "any property without compensation". When section 5(1) concludes by saying: "Any law made in contravention of the restrictions.... "shall, so far as it contravenes those restrictions, be void", the emphasis in the word "made" is not upon the moment when the words of a law qualify to be enrolled upon the statute book but upon the time when its relevant provisions can be invoked as a source of legal authority. In a case such as the present, where the Act itself defers the legal sanction to a date to be chosen, it is only on the arrival of that date that the law is "made" for the purpose of applying the governing section.

The compensation available under section 4 of the Finance Act is for any person who was "lawfully carrying on a bookmaking "business" at the date of the coming into operation of section 5 of the Betting Act; and a point is made on this that, though indeed compensation is thus provided for the law-abiding bookmaker, the terms employed may be insufficient to provide any compensation for a bookmaker who was carrying on what was described as a "mixed

"business" partly by illegal activities and partly by acts not forbidden by the law. This argument appears to me to be a mere verbalism: and I think that it can expect to receive only a verbal reply. Whatever the limits of the conception of "property" in section 5 of the Act of 1920, I do not think that it can extend to the goodwill of a business which is unlawfully conducted: or, consequently, that the Finance Act did anything less than was required of it by confining compensation to those who were lawfully carrying on business. I can offer no support for the idea that the constitutional limitation in the Government of Ireland Act compels the Legislature to pension off persistent breakers of the law before it can put into force a measure designed to bring about a more effective regulation of the activity of betting. As to the hypothetical "mixed" business, which may embrace anything from legal activities occasionally supplemented by an illegality to activities regularly illegal, though not immune from intermittent deviation into lawful betting, whatever cases arise must solve themselves according to the provisions of the Act. I should not suppose that a man would be disqualified from claiming to have been lawfully carrying on business by one or two black marks: and it may be, as the courts below have envisaged, that there are businesses which can be fairly divided into a lawful and an unlawful business. In my opinion one cannot express any final opinion on such cases without having before one the facts of a particular case and proper findings upon it.

For the reason that I have given I think that this appeal should be dismissed. I must, however, say that, in agreeing to the dismissal, I do not wish to be taken as endorsing everything that was said in the Court of Appeal on the general question of law involved. In particular I do not think that it would be correct to treat the decision of this House in *Belfast Corporation v. O. D. Cars Ltd.*[1] as depending on a distinction between what is regulatory and what is confiscatory in legislation. These adjectives, which do not by any means convey ideas necessarily exclusive of each other, have been used to illustrate distinctions when issues have arisen as to the validity of legislation which is affected by restrictions more or less analogous with that under the Government of Ireland Act. But they are not statutory phrases themselves, and in my opinion the allocation of one or other of those adjectives to a particular enactment does not in itself determine the question whether there is a "taking" within section 5 of the Act. In my view the decision in *Belfast Corporation v. O. D. Cars Ltd.*[1] was nothing more than a decision that, having regard to the ordinary

[1] [1960] N.I. 60; [1960] A.C. 490.

significance of the word "take" and the history of previous legislation in the United Kingdom which dealt with expropriation on the one hand and health, police or planning restrictions on the other, the town-planning restrictions on the user of land which were then being challenged were not a "taking" of property.

Lord Denning: My Lords, under the Government of Ireland Act, 1920, the Parliament of Northern Ireland has power to make laws for the peace, order and good government of Northern Ireland: but in the exercise of this power it must not make a law so as either directly or indirectly to take any property without compensation. If it should make any law in contravention of this restriction, then such law, so far as it contravenes the restriction, is void.

On July 29, 1957, the Parliament of Northern Ireland passed the Betting and Lotteries Act (Northern Ireland), 1957. It was, according to the preamble, an "Act to provide for the regulation of bookmakers "and bookmaking offices": and as such it was clearly within the competence of that Parliament. But James McCann, who is a bookmaker affected by it, claims that it takes away his property without compensation, and is thus far void.

James McCann carries on a bookmaking business at premises 1A Essex Street, Belfast. He has carried it on since 1955. His customers fall into three classes:

(i) Those who come to the premises to place bets with him and pay cash down. It is difficult to give numbers but roughly—very roughtly —from 1957 to 1959 these customers formed in value some 95 per cent. of all his customers.

(ii) Those who come to the premises and place bets on credit. These formed, again very roughly, some 3 per cent. in value of his customers.

(iii) Those who telephone to the premises and place bets on credit by telephone. These formed the remaining, let us say, 2 per cent. in value of his customers.

It is quite clear that, in so far as James McCann did business on the premises with customers of classes (i) and (ii), he was acting unlawfully: for he was using the premises for the purpose of "betting with "persons resorting thereto" contrary to the Betting Act, 1853. The premises were therefore by that Act declared to be a common nuisance and contrary to law.

There would be nothing unlawful in James McCann doing business with customers in class (iii) provided that he did the business in an office separate from the other business, as for instance, in an office with its own telephone and staff: see *Milne and Others v. Commissioner of Police for City of London*[1]. But James McCann did nothing of the kind. His business was conducted as one single bookmaking business on the premises 1A Essex Street. He kept some separate books for credit betting but he did nothing to distinguish between the lawful credit betting (done by telephone) and the unlawful credit betting (done by people resorting to the premises). The trial judge could only make a guess at it. "I would think", he said, "that "this unlawful type of credit betting preponderated in the small "volume of credit betting carried on by the plaintiff".

It is quite apparent, therefore, that the business was one business. It was an unlawful business: and the premises were a common nuisance and contrary to law. I have not the slightest doubt that the Parliament of Northern Ireland (which was entitled to legislate for the peace, order and good government of Northern Ireland) was entitled to suppress this unlawful business and to shut down this common nuisance without being under any necessity to provide compensation on that account. If the word "property" in section 5 of the Government of Ireland Act, 1920, includes the right to carry on a business (as to which I express no opinion), it must at any rate be a lawful business, not an unlawful one.

Supposing, however, that James McCann was carrying on a lawful bookmaking business (as, for instance, if he did carry on credit betting by telephone in a separate office) and he was prevented by the Act from carrying on that lawful business, then the Parliament of Northern Ireland has provided that he would be entitled to compensation. That is clear from section 4(1) of the Finance (No. 2) (Northern Ireland) Act, 1957.

So James McCann cannot by any possibility say that the Parliament of Northern Ireland has gone beyond its powers. If his business is unlawful, Parliament can suppress it without providing compensation for him. If it is lawful, he gets compensation.

It was argued that section 6(4) of the Betting Act, 1957, was void ab initio and could not be cured by section 4 of the Finance Act, 1957. But it was admitted that it would have been quite open to the Legislature to repeal section 6(4) and re-enact it with section 4 annexed to it. If it had done so, this point could not have been taken.

[1] [1940] A.C. 1.

The point is, therefore, a bare technicality without substance. I must say I do not think it is for the courts to throw down legislation on technicalities of this kind. If an Act does contain a constitutional flaw, I see no reason why it should not be amended so as to remove the flaw: so that, as from the date of the amendment, it is good. The duty of the court is to uphold the legislative power when it is fairly and reasonably exercised and only to strike it down when it is abused. No such abuse appears here. Quite the contrary. I would therefore dismiss the appeal.

Lord Hodson (read by Lord Denning): My Lords, the appellant, in order to obtain the declaration which he seeks, must first establish that some property was taken from him without compensation. This property is said to be a lawful bookmaking business. The trial judge and the Court of Appeal had grave doubts whether the appellant could establish the necessary facts to found the declaration. I share those doubts.

Even if the appellant could get over his first difficulty it is a complete answer to his claim that the provisions of the Government of Ireland Act, 1920, section 5, have never been infringed.

Express provision for compensation of persons lawfully carrying on a bookmaking business who are unable by virtue of "the Betting "Act", section 6, subsection (4), to carry on that business is provided by the Finance (No. 2) Act (Northern Ireland), 1957, which is to be read together with the Betting Act.

The appellant has his remedy in the county court where he can seek compensation if he is entitled to receive it.

His contention that the Finance Act cannot supply a defect or fill a gap in the Betting Act is highly artificial. It is, first, that the absence of provision for compensation in the Betting Act renders the section by which he is affected void so that the Act must be read as if the sections were not contained in it, and secondly, that nothing done thereafter can bring to life that which was always dead. I need not repeat the relevant dates.

In support of his argument the appellant relies upon some observations contained in the judgment of the Privy Council in the case of *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell and Others*[1].

Lord Buckmaster, in delivering the judgment, said, in relation to an illegal power given by an Act passed by the Legislature of Ontario,

[1] [1917] A.C. 62.

at page 81: "Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the "creation of the power and not its exercise that is subject to objection, "and the objection would not be removed even though the powers "conferred were never exercised at all."

This is not a parallel case. There is here no illegal power given by a statute. The sections impugned were postponed as to their operation until an appointed date and before that date was reached an addition had been made to the Betting Act by the Finance Act of 1957 which removed any ground for objection which there might have been if the later Act had not been passed.

I find myself in complete agreement with the judgments of the trial judge and the Court of Appeal of Northern Ireland in concluding that there is nothing to prevent the Betting Act, 1957, being read together with section 4 of the Finance Act, 1957, as the latter Act directs.

Accordingly, if it is necessary to satisfy section 5(1) of the Government of Ireland Act, 1920, this has been done.

The appellant's second argument is that even if the two Acts can be read together, there is no provision for his compensation, since the Finance Act only provides for compensation in respect of a lawful bookmaking business. His business was, according to him, partly lawful and partly unlawful and therefore no compensation is provided for him.

Again I agree with the judgments appealed from. As Lord MacDermott said, there is no reason why, if the lawful and unlawful activities can be segregated, the paragraph of the Finance Act should not operate on the lawful activity. If Parliament had intended to disqualify from compensation a bookmaker who carried on a business partly legal and partly illegal, it could have said so. If the two elements cannot be segregated and the appellant cannot satisfy the county court that he carried on a lawful bookmaking business, there will be nothing to compensate him for and he will fail in any claim he may prefer before the county court.

The appellant is clearly not entitled to the declaration which he claims, and I would dismiss the appeal.

Solicitors for the appellant: *Speechly, Mumford & Soames* for *T. M. McDonald.*

Solicitors for the respondent: *Linklaters & Paines* for the *Chief Crown Solicitor.*

Appeal dismissed.

MULHOLLAND v. McCREA AND ANOTHER[1]

Damages—Fatal accident—Deceased a passenger in car driven by her husband—Action by husband for damages under Fatal Accidents Acts and Law Reform Act—Husband partly to blame for accident—Whether damages recoverable by husband to be reduced in proportion to his fault—Computation of damages under Fatal Accidents Acts in respect of a dependant receiving a benefit from estate of deceased—Funeral expenses—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93)—*Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 9), *ss.* 14, 15(3)—*Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1948 (*c.* 23), *ss.* 2, 6(1).

Though only a single action may be brought under the Fatal Accidents Acts, 1846 to 1908, on behalf of the dependants of the deceased person, the claim in respect of each dependant for the loss resulting to him from the death is a personal and individual claim. Accordingly, when the accident which caused the death was caused partly by the fault of a dependant of the deceased, any claim of such dependant would formerly have been entirely defeated by the plea of contributory negligence, and since the passing of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, the amount recoverable under such claim falls to be reduced in proportion to the dependant's share in the responsibility for the death of the deceased.

An action for damages for loss of expectation of life brought by the personal representative of a deceased person is a representative claim brought on behalf of the deceased's estate, and the fact that the plaintiff, who is also entitled to share in the deceased's estate, has been at fault in a manner contributing to the death does not result in any reduction of the damages otherwise recoverable.

A husband sued as administrator under the Fatal Accidents Acts and for damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, in respect of the death of his wife who was killed in a collision between a car driven by the husband, in which the wife was a passenger, and a car driven by the defendant. The husband was found by the jury to have been partly responsible for the accident. The wife died intestate and the husband accordingly benefited from her estate.

Held, by the Court of Appeal (Lord MacDermott L.C.J. and McVeigh J., Curran L.J. dissenting) that the computation of damages should be in the following form. From the amount awarded to the husband as a dependant under the Fatal Accidents Acts should be deducted the benefits accuring to the husband from the wife's estate, including the benefit arising from the claim for loss of expectation of life under the Law Reform Act, 1937, and the resulting sum should then be reduced having regard to the husband's share in the responsibility for the death of the wife.

Held, further, that as the husband had claimed funeral expenses as part of his claim under the Law Reform Act, 1937, any expenses so allowed should be recoverable in full.

[1] In the Queen's Bench Division before Black L.J.: Mar. 2, 3, 4, 11, 28, 1960. In the Court of Appeal before Lord MacDermott L.C.J., Curran L.J. and McVeigh J.: Oct. 3, 4, 5, 6, 1960; Jan. 30, 1961.

Semble, that if the claim for funeral expenses had been made under the Fatal Accidents Acts the amount recoverable under such claim would have been subject to a reduction in respect of the husband's share in the responsibility for the death of the wife.

Per Curran L.J.: The plaintiff's cause of action under the Fatal Accidents Acts, like his cause of action under the Law Reform Act, is based on the breach by the defendant of his duty to take care for the safety of the plaintiff's wife and not upon any breach of duty owed to the plaintiff himself. Accordingly the fact that the plaintiff had also failed to take care for the safety of his wife could not constitute contributory negligence, and is irrelevant, since the plaintiff could not be a tortfeasor *vis-a-vis* his wife. The plaintiff should therefore recover damages both under the Fatal Accidents Acts and under the Law Reform Act without any deduction in respect of his share in the responsibility for the accident.

ACTIONS for damages for personal injuries sustained by the plaintiff and for damages for the death of the plaintiff's wife under the Fatal Accidents Acts, 1846-1908, and under the Law Reform (Miscellaneous Provisions) Act, (Northern Ireland), 1937, the actions being tried together before Black L.J. and a jury.

The facts of the case are set out in the judgment of Black L.J. in the court of first instance.

The following were the questions submitted to the jury with the answers thereto.

1. Was the accident caused either wholly or partly by the negligence of the defendant McCrea?
   ANSWER: Yes.
2. If the answer to Question 1 is "Yes", what damages would the plaintiff Mulholland be entitled to recover for his own personal injuries if McCrea was wholly to blame for the accident?
   ANSWER: £1,300.
3. Was the accident partly due to negligence on the part of the plaintiff Mulholland?
   ANSWER: Yes.
4. If the answer to both Questions 1 and 3 is "Yes", to what net amount ought the damages mentioned in the answer to Question 2 be reduced having regard to Mulholland's own share in the responsibility for the damage?
   ANSWER: £780.
5. If the answer to Question 1 is "Yes", what damages should the plaintiff recover as personal representative of his wife under the Law Reform Act if he was not to blame?
   ANSWER: £652.

6. If the answer to Question 3 is "Yes", to what net amount ought the damages mentioned in Question 5 be reduced having regard to the plaintiff's share in the responsibility for the damage?
ANSWER: £391 4s. 0d.

7. (a) If the answer to Question 1 is "Yes" what total damages should be recoverable under the Fatal Accidents Acts if the plaintiff was not to blame? (Disregarding the amount in Answers to Questions 5 and 6).
ANSWER: £2,500 less £400 that plaintiff had received on wife's death.

(b) Apportion those damages among such of the following as you hold to have been dependents of the deceased

1. Gerald Mulholland (plaintiff)	£1,860
2. Gerald Magella Ignatius Mulholland (stepson of the deceased)	Nil
3. Eileen Mary Josephine Mulholland (stepdaughter of deceased)	£100
4. Ann Mary Bernadette Mulholland (stepdaughter of the deceased)	£140

8. If the answer to Question 3 is "Yes", to what net sum should the total damages awarded to the plaintiff in the answer to Question 7(b) be reduced having regard to the plaintiff's share in the responsibility for the damage?
ANSWER: £956.

Stewart Q.C., *Kelly Q.C.* and *Staunton* for the plaintiff.

Brown Q.C., *McGonigal Q.C.* and *Hutton* for the defendant.

Cur. adv. vult.

BLACK L.J.: These actions arose out of a collision between two motor-cars on August 15, 1959 at a crossroads on the main Glenavy-Belfast Road. One of the cars was being driven by the plaintiff from Glenavy to Belfast and the other was being driven by the defendant McCrea from Nutt's Corner to Lisburn. It was conceded at the trial that the car driven by McCrea was being driven by him on the business of his employers, the defendants, the Ulster Fireclay Works Ltd. As a result of the accident the plaintiff sustained serious personal injuries, and his wife Mrs. Nora Mulholland who was a passenger in his car was killed. The plaintiff instituted two actions. The first of these actions named the Coalisland Brick Company Ltd. (apparently

an associated company of the Ulster Fireclay Works Ltd.) and McCrea as defendants and claimed damages on foot of the personal injuries sustained by the plaintiff in the accident. The second action was instituted by the plaintiff as personal representative of his wife against McCrea and the Ulster Fireclay Works Ltd. as defendants. In this action the plaintiff claimed damages on foot of the death of his wife on behalf of her estate under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and on behalf of her dependants under the Fatal Accidents Acts, 1846 to 1908. Shortly after the issue of the writs the plaintiff discontinued the first action as against the Coalisland Brick Comapny Ltd. and by an order dated January 15, 1960, it was ordered that the two actions be tried together as one action with separate issues as to contributory negligence and as to damages.

The action came on for hearing before a jury on March 2, 1960. The hearing lasted three full days and the jury gave lengthened and obviously very careful consideration to the questions submitted to them. From their answers to those questions and their apportionment of the damages which they found to be appropriate to the case it is clear that they considered that the responsibility for the accident should be held to be borne as regards 40% by the plaintiff and as regards 60% by the defendant McCrea. So while holding that the plaintiff would have been entitled to recover £1,300 on foot of his claim for his own personal injuries if McCrea had been wholly to blame for the accident they awarded that this sum should be reduced to £780 having regard to the plaintiff's own share in the responsibility for the damage. These findings do not appear to give rise to any legal difficulty and inasmuch as McCrea is now the only defendant to the action claiming damages for the plaintiff's personal injuries there must be judgment for the plaintiff against McCrea alone for £780 on this head of claim.

As regards the claim under the Law Reform Act the jury held that the plaintiff would be entitled to recover £652 under this head as personal representative of his wife if he was not to blame. This amount of £652 requires a little explanation. It was agreed that Mrs. Mulholland's funeral expenses should be taken as £52. I am afraid I directed the jury to add this amount to whatever amount they should find the plaintiff otherwise entitled to under the Law Reform Act. Accordingly the jury's finding as to damages under the Law Reform Act on the basis that the plaintiff was not to blame must be taken as £600 plus the £52 in respect of funeral expenses. I shall have to recur to this item later. In answer to a question as to the net amount

to which the £652 should be reduced having regard to the plaintiff's share in the responsibility for the damage the jury answered £391 4s. 0d. which of course is the £652 less the 40% which the jury held ought to be borne by the plaintiff.

The next questions which I submitted to the jury dealt with the damages to be awarded under the Fatal Accidents Acts. In answer to the question as to what total damages should be recoverable under those Acts if the plaintiff was not to blame the jury answered £2,500 less £400 that the plaintiff had received on his wife's death and further answered that those damages should be apportioned as to £1,860 to the plaintiff, as to £100 to the deceased's stepdaughter Eileen Mary Josephine Mulholland, and as to £140 to her stepdaughter Ann Mary Bernadette Mulholland. The explanation of the deduction of the £400 is that subject to certain statutory exceptions (such as that introduced by the Fatal Accidents (Damages) Act, 1908 in regard to insurance moneys) it is well established that in calculating the amount to be awarded to dependants under the Fatal Accidents Acts the jury should have regard to any pecuniary benefits accrued to the dependants by reason of the death, and in the present case the plaintiff became entitled from the deceased's estate upon her intestacy to some £400 quite apart from amounts payable on foot of certain insurance policies.

The question which next arises is as to the effect of the plaintiff's contributory negligence. Before the passing of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, it was accepted law that a finding of contributory negligence on the part of the deceased was a complete answer to a claim under the Fatal Accidents Acts: *Senior v. Ward*[1], and see *Nunan v. Southern Railway Co.*[2] per Bankes L.J. and Scrutton L.J. But so far as I am aware there is no reported authority either in England or Ireland deciding whether or not contributory negligence on the part of one of the deceased's dependants on whose behalf the claim is brought can be set up against that dependant's claim. Under section 2 of the Fatal Accidents Act, 1846, it is enacted that every action brought under the Act shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused and shall be brought by and in the name of the executor or administrator of the person deceased. The remedy given by the Act is a remedy not to the estate of the deceased but to such individuals as are found to be dependants, and each individual dependant must be considered separately. And

[1] (1859) 28 L.J. Q.B. 139. [2] [1924] 1 K.B. 223, 226, 228.

so the action even if brought by an executor or administrator is not brought by him in his ordinary capacity as the personal representative representing the estate of the deceased but is brought in what has been termed a special capacity in right of the dependants. Damages recovered under the Act do not go to form part of the estate of the deceased, they are not liable for the deceased's debts, and they are not subject to the death duties payable on his death. In other words in an action based on the Fatal Accidents Acts the real plaintiffs are the dependants on whose behalf the action is brought. It would seem to me that, in any system of law which recognizes contributory negligence either as a total or as a partial answer to an action for damages for negligence, the contributory negligence of a dependant on a claim for the recovery of damages on behalf of individual dependants in the manner provided by the Fatal Accidents Acts must logically be either a total or partial answer to the claim of the dependant who has been found gulity of such contributory negligence. This is the view taken by Dr. Glanville Williams in his learned treatise on Joint Torts and Contributory Negligence in which (dealing with English law) he states at p. 443 in a passage which I shall presently quote in full, that at common law (i.e. before the passing of the English Law Reform (Contributory Negligence) Act, 1945) the contributory negligence of a dependant should defeat that dependant's claim though not the claims of the other beneficiaries. It is now however provided by section 2(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, which follows the wording of section 1(1) of the English Act of 1945, that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. This would seem to me to cover exactly the present case. The jury have found that the loss for which the plaintiff in his personal capacity claims to be compensated under the provisions of the Fatal Accidents Acts was suffered by him as a result partly of his own fault and partly of the fault of the defendant McCrea. Accordingly it appears to me to follow that the amount recoverable under those Acts by the plaintiff as one of the dependants of the deceased should be reduced as directed by the Act of 1948. Mr. Stewart however argued that the Act of 1948 is not applicable in the present case by reason of the definition of the word "fault" in the

Act. "Fault" is defined in section 6(1) of the Act as meaning "negligence, breach of statutory duty or other act or omission which "gives rise to a liability in tort or would, but for this Act, give rise to "the defence of contributory negligence". Mr. Stewart, basing an argument on *Chant v. Read*[1], contended that the plaintiff had not been guilty of "fault" within this definition. In *Chant v. Read*[1] Read's wife had been killed in a collision between a motor-car driven by Read and a motor cycle ridden by Chant. Read as personal representative of his wife instituted an action against Chant claiming damages for his wife's loss of the normal expectation of life pursuant to section 1(1) of the English Law Reform (Miscellaneous Provisions) Act, 1934. Chant subsequently brought an action against Read under section 6(1) of the English Law Reform (Married Women and Tortfeasors) Act, 1935, claiming that Read as a joint tortfeasor was liable to pay contribution towards any damages for which Chant might be held liable to Mrs. Read's estate. It was held by Hallett J. that as Mrs. Read could not have sued her husband for tort on foot of her loss of her normal expectation of life Read was not a tortfeasor who was or would have been, if sued, liable in respect of damages for which Chant would be liable to Mrs. Read's estate. *Chant v. Read*[1] was, of course, decided several years before the passing of the English Law Reform (Contributory Negligence) Act, 1945, and the corresponding Northern Ireland Act of 1948. Mr. Stewart, relying on the decision in *Chant v. Read*[1], contended that the plaintiff's negligence in the present case did not constitute "fault" within the definition as it did not give rise to a liability in tort to his wife's estate. This may or may not be so. But in the view which I have already expressed it would, quite apart from the Act of 1948, have given rise to the defence of contributory negligence against the plaintiff's claim under the Fatal Accidents Acts as one of the dependants of his wife. Accordingly I am satisfied that the damages recoverable by the plaintiff as a dependant under the Fatal Accidents Acts must be abated as directed by section 2 of the Act of 1948. If it were not for the Act of 1948 I would have had to hold that the plaintiff's claim as a dependant under the Fatal Accidents Acts (as distinguished from the claims of the other dependants) was completely defeated by the finding against him of contributory negligence. Mr. Brown on behalf of the defendants has conceded that notwithstanding the finding of contributory negligence on the part of the plaintiff the other dependants are entitled to recover in full the amounts awarded to them by the jury.

[1] [1939] 2 K.B. 346.

The legal position is thus summed up in Dr. Glanville Williams' valuable book Joint Torts and Contributory Negligence to which I have already referred. At p. 443 the learned author says: "A question "that is not answered either in the Fatal Accidents Act or in the "English cases is whether the contributory negligence of the personal "representatives, or of the dependants, bars recovery. It is convenient "to deal with the question at once, though the discussion must travel "a little beyond the law of identification. It will be remembered that "under the Fatal Accidents Act the action is normally brought by the "personal representatives on behalf of the dependants, though the "dependants are allowed to sue in their own names if there are no "representatives or if the representatives have taken no action in the "first six months. It is submitted that the contributory negligence of "the personal representative as nominal plaintiff should be regarded "as immaterial though it may subject him to a claim for contribution "or indemnity under the Tortfeasors Act... The contributory "negligence of a dependant, being the real plaintiff in interest, should "at common law defeat him, though not the other beneficiaries. "These views accord with the weight of opinion in the United States "and with authority in Canada. Where the personal representative is "also a dependant he should be allowed to recover on behalf of the "other dependants, though not, at common law, on his own behalf. "It is submitted that since the Contributory Negligence Act the "apportionment provisions apply, the case falling precisely within "section 1(1) of the Act. Thus the non-negligent dependant should "recover in full, while the negligent dependant should be subject to "apportionment".

Taking this view of the legal position the final question which I submitted to the jury was to what net sum should the total damages awarded by them to the plaintiff on foot of his claim under the Fatal Accidents Acts be reduced having regard to his share in the responsibility for the damage. To this question the jury answered £956. I asked them how they had arrived at this sum. They retired for a few minutes to the jury room and on their return handed me a note which I have directed should be attached to the issue paper. From this note it appears that they started from the £2,500. From this they deducted the £240 which they had awarded to the other dependants (the plaintiff's children). This left £2,260. From this they deducted £904 representing the 40% which they had assessed as the plaintiff's responsibility for the accident thus leaving £1,356. And from this £1,356 they deducted the £400 which had come to the plaintiff upon his wife's death, thus arriving at the final sum of £956. For my part I

regard this reasoning and this process of calculation by the jury as unimpeachable.

I come now to the damages under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937. The jury held that the amount recoverable by the plaintiff as personal representative of his wife on the basis that he was not to blame for the accident was £652. As I have already explained, the £52 represented the amount of the funeral expenses. Inasmuch as Mrs. Mulholland died intestate and the net value of her estate was much less than £5,000 the whole of the remaining £600 (or 60% thereof as the case may be) would pass under the provisions of section 7 of the Administration of Estates Act (Northern Ireland), 1955, to the plaintiff. In view of the principle that any financial benefit accruing to a dependant of a deceased person upon the death of the deceased must be taken into account in determining the amount recoverable by that dependant under the Fatal Accidents Acts it has been settled by the highest authority that there must be no duplication of damages and that a dependant cannot retain damages awarded to him under both Acts: *Davies v. Powell Duffryn Associated Collieries Ltd.*[1]. Following the course taken by the English Court of Appeal in *Hutchinson v. London and North Eastern Railway Co.*[2] I think it best to treat the whole of the plaintiff's damages as awarded under the Fatal Accidents Acts inasmuch as the amount awarded by the jury to the plaintiff as a dependant under those Acts is substantially greater than the amount measured by the jury as recoverable under the Law Reform Act. The amount measured by the jury under the Law Reform Act for the deceased's loss of expectation of life will accordingly merge in the £956 awarded by them to the plaintiff under the Fatal Accidents Acts.

There is however one qualification to be made. The funeral expenses could be treated either as recoverable under the Law Reform Act (as was done in *Davies v. Powell Duffryn Associated Collieries Ltd.*[1]) or alternatively by virtue of section 15(3) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, as recoverable as part of the plaintiff's damages under the Fatal Accidents Acts (which was the course taken in *Lory v. Great Western Railway Co.*[3]). In any event the Legislature clearly intended that whichever course was taken the funeral expenses should be taken into account in calculating the amount recoverable. If the whole of the amount awarded by the jury under the Law Reform Act in the

1 [1942] A.C. 601.
2 [1942] 1 K.B. 481, 491
3 [1942] 1 All E.R. 230.

present case was allowed to merge in the £956 the effect would be that nothing would be recovered by the plaintiff on foot of the funeral expenses. There must accordingly be an addition on foot of the funeral expenses to the £956 mentioned in the jury's answer to Question 8, but in view of the jury's opinion that the plaintiff was partly responsible to the extent of 40% for the damages the amount to be added to the £956 will not be the whole £52 but only 60% thereof i.e. £31 4s. 0d.

In the result therefore there will be judgment for the plaintiff for £780 against the defendant Robert Fergus McCrea in the first action and in the second action there will be judgment for the plaintiff against the defendants Robert Fergus McCrea and Ulster Fireclay Works Ltd. for £956 + £31 4s. 0d. + £240 in all, of which £987 4s. 0d. will be recovered on the plaintiff's own behalf as a dependant of his wife Nora Mulholland and the sums of £100 and £140 will be recovered on behalf of Eileen Mary Josephine Mulholland and Ann Mary Bernadette Mulholland respectively, stepdaughters and dependants of the deceased. The £100 and the £140 must be paid into court by the defendants and will be invested in Ulster Savings Certificates for the benefit of the respective beneficiaries.

Judgment accordingly.

The plaintiff appealed to the Court of Appeal.

Stewart Q.C., *Kelly Q.C.* and *Staunton* for the plaintiff and appellant.

Brown Q.C., *McGonigal Q.C.* and *Hutton* for the defendant and respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: Both these actions arise out of a tragic collision between two motor-cars on August 15, 1959, at a right-angled intersection where the road from Glenavy to Belfast crosses a road running from a point known as the Five Road Ends to Lisburn. The plaintiff and appellant was driving from Glenavy to Belfast with his wife as a passenger. The defendant McCrea, an employee of Ulster Fireclay Works Ltd., the second defendants in the second action, was driving the other car towards Lisburn along the other road. The collision was severe. The plaintiff's wife was killed and he himself was gravely injured. In the first action the plaintiff sued for damages in respect of his own personal injuries. In the second he sued as the administrator of his wife's estate for

damages in respect of his wife's death (a) under the Fatal Accidents Acts, 1846-1908, and (b) under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, (hereinafter referred to as the Law Reform Act or the Act of 1937). The claim under the Fatal Accidents Acts was brought on behalf of the dependants of the deceased who were named as being the plaintiff himself and his children by a former marriage.

The plaintiff alleged that the accident was caused by the negligence of McCrea. This was denied by the defendants, who also set up a plea of contributory negligence on the part of the plaintiff. The actions were heard together before Black L.J. and a jury and resulted in findings that the defendants had been negligent and that the plaintiff had been guilty of contributory negligence. The jury took the view that the plaintiff was 40% to blame and this led, in the first action, to a verdict for the plaintiff in respect of his own personal injuries for the sum of £780, being the total damages (assessed at £1,300) as reduced by the jury in accordance with their view regarding the extent of the plaintiff's responsibility for the accident. The effect of this view on the claims advanced in the second action will be dealt with later.

The first ground of appeal related to both actions. It was that there was no evidence of contributory negligence on the part of the plaintiff proper to be submitted to the jury. In my opinion this contention cannot succeed. The intersection in question was dangerous for motor vehicles, and it is a great pity that the steps taken since the accident to make it safer by improving visibility and erecting warning signs, had not been taken earlier. But, whatever the difficulties of observing converging traffic may have been for the drivers, the transcript of the evidence contains sufficient material on which a reasonable jury might find, as this jury did, that the plaintiff was guilty of negligence, and that his negligence contributed to the accident to the extent already mentioned. The question is not whether this court agrees with those findings but whether twelve reasonable men might have reached them; and that test is so plainly satisfied that a detailed examination of the evidence need not be made in this judgment. I would therefore hold against the plaintiff on this branch of the appeal. On that view, the first action falls out of the case and need not be considered further. I turn then to the second action and to the points which it raises. These have a general importance and the wonder is that they have not been settled by authority already.

The first point is whether the damages which the jury, having found the plaintiff to be a dependant of his deceased wife, allotted to him under the Fatal Accidents Acts fall to be reduced under section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, (hereinafter referred to as the Act of 1948) on account of the plaintiff's contributory negligence. The questions left to the jury were framed with this issue in mind and Black L.J., in a considered judgment on the effect of the findings concluded that section 2 applied to the damages awarded to the plaintiff as such dependant and that the amount thereof had to be reduced accordingly. In so deciding, the learned judge adopted the view taken by Dr. Glanville Williams in his work on Joint Torts and Contributory Negligence at p. 443, and held –if I may summarise the substance of his reasoning—(a) that the plaintiff, though suing in fact as personal representative, was not suing as a representative of the estate of the deceased, (b) that his claim as a dependant was made in an individual or personal capacity, (c) that at common law such a claim would have been entirely defeated by the plaintiff's contributory negligence, and (d) that it now survives, though subject to reduction, under section 2(1) of the Act of 1948. Before going further, I should refer to the terms of that subsection. So far as material, they read thus: "Where "any person suffers damage as the result partly of his own fault and "partly of the fault of any other person or persons, a claim in respect "of that damage shall not be defeated by reason of the fault of the "person suffering the damage, but the damages recoverable in respect "thereof shall be reduced to such extent as the court thinks just and "equitable having regard to the claimant's share in the responsibility "for the damage:...."

If the plaintiff were suing in a strictly representative capacity for the benefit of his wife's estate in respect of a cause of action which was hers, a plea of contributory negligence on the part, not of the deceased but of the plaintiff, would be irrelevant in the ordinary course of events. But it is manifest that the plaintiff's claim under the Fatal Accidents Acts is not a representative claim in this sense. It does not enure for the benefit of the estate and the condition enacted by section 1 of the Fatal Accidents Act, 1846, namely, that the default alleged must be such "as would (if death had not ensued) "have entitled the party injured to maintain an action and recover "damages in respect thereof" does nothing to make the claim under those Acts the claim of the deceased or of the estate. I did not understand counsel for the plaintiff to argue the contrary. Their contention on this branch of the case was two-fold. In the first place, they said,

in effect, that the plaintiff's claim under the Fatal Accidents Acts, though not representative in the strict sense of being brought by the representative for the benefit of the estate, was yet representative in the sense that it was made on behalf of all entitled as dependants and so could not properly be treated as a collection of distinct personal claims such as might attract a plea of contributory negligence on the part of an individual dependant. And, secondly, they submitted that the plaintiff's claim as a dependant was not subject to reduction under section 2(1) of the Act of 1948.

It is true that by section 3 of the Act of 1846 only one action can be brought under the Fatal Accidents Acts and that the dependants have not the right to bring a series of separate actions. And it is also true that the issues in such an action are not, when the plaintiff is the representative, normally joined with the dependants, and that the party sued may, under section 2 of the Act of 1864, pay one undivided sum into court without specifying the shares of the dependants. Nevertheless, the Acts themselves and the decisions upon them seem to me to be clearly against the first of the plaintiff's contentions. Thus, we find in section 2 of the Act of 1846 that "every such action "shall be for the benefit of the wife, husband, parent, and child of the "person whose death shall have been so caused, and shall be brought "by and in the name of the executor or administrator of the person "deceased; and in every such action the jury may give such damages "as they may think proportioned to the injury resulting from such death "to the parties respectively for whom and for whose benefit such "action shall be brought; and the amount so recovered after deduct-"ing the costs not recovered from the defendant, shall be divided "amongst the before-mentioned parties in such shares as the jury by "their verdict shall find and direct".

Then, by section 1 of the amending Act of 1864 provision is made for cases where there is no executor or administrator or where such representative shall not bring an action within six months of the death of the deceased person. In either of those events this section enacts that the action "may be brought by and in the name or names "of all or any of the persons (if more than one) for whose benefit such "action would have been, if it had been brought by and in the name "of such executor or administrator; and every action so to be "brought shall be for the benefit of the same person or persons,.... "as if it were brought by and in the name of such executor or "administrator."

In themselves, these provisions seem to me to justify the view expressed by the learned trial judge when he says: "The remedy "given by the Act is a remedy not to the estate of the deceased but to "such individuals as are found to be dependants, and each individual "dependant must be considered separately. And so the action even if "brought by an executor or administrator is not brought by him in "his ordinary capacity as the personal representative representing "the estate of the deceased but is brought in what has been termed a "special capacity in right of the dependants. Damages recovered "under the Act do not go to form part of the estate of the deceased, "they are not liable for the deceased's debts, and they are not "subject to the death duties payable on his death. In other words in "an action based on the Fatal Accidents Acts the real plaintiffs are "the dependants on whose behalf the action is brought".

I need only refer to some of the decisions which support this passage. In *Pym v. Great Northern Railway Co.*[1], Erle C.J. says, with the concurrence of his brethren, in the Exchequer Chamber: "The "statute, as appears to me, gives to the personal representative a "cause of action beyond that which the deceased would have if he "had survived, and based on a different principle". And later he adds[2]: "The remedy however given by the statute is not given to a "class but to individuals..... This requires the jury to consider how "each of the parties is situated, and how the interest of each is "affected".

Then in *Seward v.* "*Vera Cruz*"[3], Lord Selborne L.C. has this to say of the same legislation: "Lord Campbell's Act gives a new cause "of action clearly, and does not merely remove the operation of the "maxim, 'actio personalis moritur cum persona', because the action "is given in substance not to the person representing in point of "estate the deceased man, who would naturally represent him as to "all his own rights of action which could survive, but to his wife and "children, no doubt suing in point of form in the name of his executor. "And not only so, but the action is not an action which he could "have brought if he had survived the accident, for that would have "been an action for such injury as he had sustained during his life-"time, but death is essentially the cause of the action, an action "which he never could have brought under circumstances which if he "had been living would have given him, for any injury short of "death which he might have sustained, a right of action, which might

[1] (1863) 4 B. & S. 396, 406.
[2] Ibid. 407.
[3] (1884) 10 App. Cas. 59, 67.

"have been barred either by contributory negligence, or by his own "fault, or by his own release, or in various other ways".

In *British Electric Railway Co. Ltd. v. Gentile*[1], Lord Dunedin restates the substance of these views; and in *Union Steamship Company of New Zealand v. Robin*[2], Lord Buckmaster, speaking of an almost identical New Zealand statute, observes: "The cause or "basis of the action is the death of the workman under certain "conditions. It is not his action that is transmitted, but a new right of "action arising on his death with a consequent measure of damage "independent of that by which the deceased would have been "limited".

In *Avery v. London and North Eastern Railway Co.*[3], the nature of the relief afforded by the Fatal Accidents Acts again arose for consideration by the House of Lords on facts which I need not rehearse, but which emphasized the personal and individual nature of the claims made by the dependants of a deceased person. Lord Atkin (in whose opinion Lords Maugham, Thankerton and Russell of Killowen concur) says[4]: "If a claim were made under Lord "Campbell's Act after 1846 it is manifest, I venture to think, that no "question of group compensation arises". And Lord Macmillan speaks to the same effect[5] when he cites *Pym v. Great Northern Railway Co.*[6] as settling that "the remedy given by the statute is to "individuals, not to a class....."

It is a fact that none of these authorities deals with the effect of contributory negligence on the part of a dependant, and the researches of counsel and the court have not discovered any case in the United Kingdom or the Irish Republic in which this question is considered. But it has been considered and decided, in relation to comparable legislation, in Canada in *Trueman v. Hydro Electric Power Commission of Ontario*[7] a decision of the Appellate Division of the Ontario Supreme Court. The material facts there were very similar to those of the present case. The jury having apportioned the damages in respect of the death of a wife between her dependants, who were her husband, the plaintiff and driver of the car in which the deceased was travelling, and her children, the trial judge dismissed the action as respects the husband's claim on the ground that he had been found guilty of contributory negligence. Meredith C.J.O. was

1 [1914] A.C. 1034, 1040.
2 [1920] A.C. 654, 661.
3 [1938] A.C. 606.
4 Ibid. 612.
5 Ibid. 619.
6 (1863) 4 B. & S. 396.
7 [1924] 1 D.L.R. 405.

for reversing this decision on the ground that the right of action was a representative right derived through the deceased. The other members of the court, Magee, Hodgins and Ferguson JJ.A., were of the contrary opinion. The following excerpts from the judgments of the majority will suffice to indicate their views. Magee J.A., says this[1]: "In view of the wording of the Imperial Act and our own, it would "seem clear to me that the action, whether brought by the executor "or by one of the children or parent or by the husband, is in no sense "a representative action, but one in which each beneficiary is to "recover for himself the damages which he personally sustains—the "whole being for the injury resulting to them 'respectively'." And Ferguson J.A., after a review of the authorities, concludes thus[2]: ". . . . it seems to me that the husband is not suing as representative of "a class or the estate of the deceased, but as representing himself and "as trustee for each individual member of the family who suffered "loss, and therefore in this action is putting forth a claim in his own "right and for his own benefit, along with a claim as representative of "and trustee for each of the individuals entitled to compensation, "and that to allow him to recover compensation for his own loss is to "ignore that he is the author of his own wrong, and the rule lying at "the root of our law of contributory negligence."

I respectfully agree with the conclusion reached by the majority in *Trueman's* case[3]. Once it is accepted, as in my opinion it now must be accepted, that the claim of a dependant to recover the loss caused by the death of a deceased person is a personal and individual claim, I can find no ground for ignoring the negligence of the claimant which has contributed to cause the death and, therefore, the loss, or for disregarding at common law the rule which prevented a claimant guilty of such negligence from recovering damages. The Fatal Accidents Acts have nothing explicit to say on the matter; but the fact that they were passed to meet cases of hardship caused by the actio personalis moritur cum persona rule is no reason for supposing that they were intended to place the class thus benefited in a specially favourable position as respects contributory negligence.

On this view the appellant's second contention, namely, that section 2(1) of the Act of 1948 does not apply, must, if sound, be to his detriment, for it is that enactment which makes contributory negligence no longer a complete defence. In my opinion, however, this contention is not sound. Much was made of the relationship between the plaintiff and the deceased and we were invited to hold

[1] [1924] 1 D.L.R. at 412.
[2] Ibid. 422.
[3] Ibid. 405.

that as the plaintiff could not have been liable in tort to his wife he could not be a person at fault for the purposes of section 2(1) having regard to the definition of "fault" in section 6(1) of the Act of 1948. Counsel, in support of this contention, cited *Chant v. Read*[1], a case relating to the right of contribution between joint tortfeasors. I am unable to see the relevance of this decision as the present claim under the Fatal Accidents Acts does not raise any question of contribution and is not a claim derived from the deceased wife.

It was also said that the language of section 2 is not apt to cover the contributory negligence of a dependant in a suit such as this. I think some confusion may have crept into the argument at this point through applying the meaning given to "damage" by section 6(1) of the Act of 1948 so as to make the first line of section 2(1) read: "Where any person suffers loss of life....". That would be an appropriate reading if the appellant were suing on behalf of his wife's estate in respect of her cause of action. But it is plainly not appropriate in a claim such as that now under discussion. That claim, and the defence of contributory negligence raised against it, seem to me to come clearly within the terms of section 2(1) and I can find nothing in the definition of "fault" to lead to a different conclusion.

For these reasons I would hold that the plaintiff's claim as a dependant under the Fatal Accidents Acts is, on the findings, reducible under section 2(1).

The next point for consideration is whether the jury's computation of damages in respect of the plaintiff's claim as a dependant is, as the learned trial judge has held, correct.

What the jury did is clear from the note they gave the judge in response to his query as to how they had arrived at the figure of damages payable to the plaintiff as a dependant under the Fatal Accidents Acts. That figure was £956 and it was reached in this way. The jury first assessed what I may call the total gross loss resulting from the death—that is to say, the loss sustained by the dependants without taking into account any sums receivable because of the death. This total gross loss was fixed at £2,500. No question arises as to this amount or the manner—whatever it was—in which it was measured. Then, from this sum the jury deducted £240, which was the addition of the awards they made to the dependent children. Again, no question arises as to this figure or the propriety of deducting it at this point. Having made this deduction, the jury were left

[1] [1939] 2 K.B. 346.

with the sum of £2,260 as representing the gross damages attributable to the plaintiff's loss as a dependant. The next step taken was to deduct from this figure 40% thereof in respect of the plaintiff's share in the responsibility for the accident. Forty per cent. of £2,260 is £904, and this deduction accordingly reduced the plaintiff's award to one of £1,356. From this sum the jury deducted £400, being the benefit received by the plaintiff from his wife's estate on her intestacy. This left the said sum of £956.

There was no dispute that the sum of £400, which I have just mentioned, had to be deducted from the plaintiff's damages as a dependant at some point. It was agreed that the deceased wife left £400, and that this passed, in its entirety, under the Administration of Estates Act (Northern Ireland), 1955, to the plaintiff. It is well settled that a gain or benefit of this sort must be set against the damages which would otherwise be payable to a dependant under the Fatal Accidents Acts. As Lord Russell of Killowen says in *Davies v. Powell Duffryn Associated Collieries Ltd.*[1], "Under those Acts the "balance of loss and gain to a dependant by the death must be "ascertained, the position of each dependant being considered "separately". But while this is clear, I am of opinion that the method of computation followed by the jury introduced this deduction at the wrong point and so failed to give due effect to section 2(1) of the Act of 1948. Under that subsection it is the full amount of the damages suffered by the party guilty of contributory negligence that must be abated; and this is borne out by subsection (2) of the same section, which provides that—"the court shall find and record the total "damages which would have been recoverable if the claimant had "not been at fault". What then, were the total damages which the plaintiff, as a dependant, would have recovered under the Fatal Accidents Acts if he had not been at fault? Commencing with what I have called the total gross loss resulting from the death, that is to say, the sum of £2,500, the next step must be to deduct, as the jury did, the awards to the children amounting to £240. That leaves as the gross damages in respect of the plaintiff's claim the said sum of £2,260. From this, if the plaintiff had not been guilty of contributory negligence, there would have fallen to be deducted the £400 received from the wife's estate on her death, leaving as the total damages recoverable by the plaintiff, if he had not been at fault, the sum of £1,860. It is that sum, not the £2,260, which must be reduced in respect of the plaintiff's contributory negligence, and applying

[1] [1942] A.C. 601, 606.

the 40% at that point a further deduction of £744 has to be made, leaving as the nett loss recoverable by the plaintiff as damages £1,116 and not, as the jury reckoned, £956. The error made by the jury was to apply the 40% deduction to a sum larger than the total damages which would have been recoverable if the plaintiff had not been at fault. This means that the jury's computation on the Fatal Accidents Acts claim was £160 short of what it should have been.

So far, I have dealt only with the claim under the Fatal Accidents Acts. I now turn to the claim under the Act of 1937. On the basis that the plaintiff was not to blame for the accident, the jury measured the damages in respect of that claim at £652. This was made up of £600 for loss of expectation of life, and £52 the amount of the funeral expenses. I shall ignore this latter item for the moment, and until I come back to it later I shall refer to the £600 as the Law Reform damages.

The next point arising is whether the Law Reform damages are reducible under section 2 of the Act of 1948. This is not an academic question as it affects the computation under the Fatal Accidents Acts, and may be of importance when I come to deal with the item of funeral expenses. As respects the Law Reform Act cause of action, the plaintiff sues and the claim is made in a strictly representative capacity. The Law Reform damages are recovered for the deceased's estate and are available to satisfy any claims that may be made upon it. It seems to me that the same reasoning which makes section 2 of the Act of 1948 applicable to claims under the Fatal Accidents Acts makes that section inapplicable to this Law Reform claim. In the one case the claim is personal and therefore not really representative. In the other it is really representative and therefore not personal. The amount recoverable by the estate cannot depend on the chance that the personal representative was a person at fault in the event causing the death. Moreover, section 2, on what I would hold to be its true construction, does not provide for a claim by a representative as such who is personally at fault. It clearly provides for a claim in respect of the estate of a deceased who has died as the result of the negligence of another, but in that class of case the language of section 2(1) would appear to restrict any relevant contributory negligence to that of the deceased. The result of this may be that in a claim confined to seeking damages under the Law Reform Act a representative plaintiff, who is also entitled to share in the deceased's estate, may get his share without any abatement despite having been at fault in a manner contributing to the death. I do not see any way

of avoiding this in claims of that particular kind where there is no effective provision for contribution as between the joint tortfeasors. There is no machinery whereby the court dealing with the claim can proceed to administer the estate and make a deduction from the share to which the claimant at fault may become beneficially entitled.

This anomaly, however, does not amount to much in the present case as it includes a claim under the Fatal Accidents Acts. The Law Reform damages come into the estate in circumstances which entitle the plaintiff, as the surviving spouse, to receive them beneficially and so as to make his total beneficial share of the deceased's estate £1,000 and not the £400 which it would otherwise have been. The decision in *Davies v. Powell Duffryn Associated Collieries Ltd.*[1] was directed to a situation of this sort, and there may be two ways of proceeding therein where the damages under the Law Reform Act are less than the plaintiff's damages under the Fatal Accidents Acts. One is that the plaintiff should have judgment for the Law Reform damages and that the amount thereof coming to him beneficially should then be deducted from his share of the Fatal Accidents Acts damages. The other is that there should be no judgment for the Law Reform damages and that they should be taken as merged in the other and larger award. There is, I think, no hard and fast rule about the method to be followed. In some cases, particularly in those where there may be claims outstanding against the estate, it will generally be better to give judgment for the Law Reform Act damages. In others, where the administration of the estate is simple and straightforward, it may be preferable to follow the second method and make the whole award under the Fatal Accidents Acts, as was done in *Hutchinson v. London and North Eastern Railway Co.*[2]. That is what the learned trial judge did here, but on the views I have expressed as to how the amount recoverable by the plaintiff under the Fatal Accidents Acts should be computed, having regard to the finding of fault against him, it is, I think, desirable that the first method should be followed and judgment entered separately for the Law Reform damages. That will enable those damages to be treated, in the Fatal Accidents Acts claim, in the same manner as the £400 and to be brought into account at the right point in the computation under those Acts. This computation would then be as follows:

Total gross loss due to death	£2,500
Deduct children's awards	£240
	£2,260

[1] [1942] A.C. 601.

[2] [1942] 1 K.B. 481.

Deduct benefits receivable by plaintiff from the deceased's estate, £400 + £600	£1,000
Plaintiff's damages as a dependant if not at fault ..	£1,260
Deduct 40%	£504
Plaintiff's damages under Fatal Accidents Acts ..	£756

The Law Reform damages will be the £600 already mentioned plus such part of the funeral expenses as may be recoverable. Black L.J. reckoned these expenses as part of the Fatal Accidents Acts claim and scaled them down by 40% to become £31 4s. 0d. Accordingly, in entering judgment for the plaintiff he allocated to him personally the sum of £956 together with the sum of £31 4s. 0d. or £987 4s. 0d. in all.

The relevant statutes make it possible to include a claim for funeral expenses under either cause of action. By section 14(2) (c) of the Law Reform Act of 1937 damages recoverable thereunder for the benefit of a deceased person's estate may include "a sum in respect of "funeral expenses"; and by section 15(3) of the same Act damages under the Fatal Accidents Acts "may be awarded in respect of the "funeral expenses.... if such expenses have been incurred by the "parties for whose benefit the action is brought".

It is obvious that, notwithstanding these provisions, funeral expenses cannot be awarded twice over, and in point of fact the plaintiff has only claimed such expenses under his Law Reform Act claim. Now I see no reason why such expenses when allowed under the Fatal Accidents Acts to a dependant should not abate with the rest of the damages awarded under those Acts to that dependant if he has been guilty of contributory negligence. Where so allowed, such expenses will be part of the loss suffered by the dependants and cannot be treated differently from the rest of his damages. But funeral expenses awarded as Law Reform damages seem to be in quite a different category. They go to the estate and I can see no ground for distinguishing them, in relation to immunity from reduction under section 2 of the Act of 1948, from the rest of the Law Reform damages. I am therefore of opinion that the £52 for funeral expenses claimed by the plaintiff is recoverable by him as administrator in full and without abatement.

One last point remains. Should the £52 for funeral expenses be

brought into account, like the £600 and the £400, when computing the damages under the Fatal Accidents Acts? What must be brought into account—apart from the statutory exceptions—are payments received or receivable by the dependant concerned for himself because of the death. Money received by the representative *as such* to meet an obligation of the estate is subject to completely different considerations and I see no reason why it should be deducted from the Fatal Accidents Acts damages. It may indirectly relieve the representative from paying what he might otherwise have to pay out of his own pocket, but it does not go to him in a personal capacity.

For these reasons I would vary the order made respecting the second action by entering judgment for the plaintiff under the Law Reform Act in the sum of £652 (including funeral expenses) and making his share of the Fatal Accidents Acts damages £756 instead of £956. This means that the total payable to the plaintiff in his representative and personal capacities will be £1,408 and not £987 4s. 0d. as awarded in the court below.

The plaintiff has failed as respects the finding of contributory negligence and on the main issue as to the effect thereof on his share of the Fatal Accidents Acts damages; but he has succeeded to the extent of substantially increasing the amount recoverable. In the circumstances I think he should have one half of his costs of the appeal from the defendants.

CURRAN L.J.: I have no difficulty in agreeing that in the action in which the plaintiff claims damages for personal injuries, and in the action in which he claims on behalf of the estate of his deceased wife, under the Law Reform Act, the findings of the jury must stand, without any deduction in respect of the plaintiff's negligence from the damages awarded under the Law Reform Act.

With regard to the action in which the plaintiff claims damages on behalf of himself and the other dependants of his deceased wife, under the Fatal Accidents Acts, I have also no difficulty in agreeing that the findings of the jury as to the defendant's negligence and as to the total amount of damages and as to the apportionment thereof, must stand. There remains, however, the question whether the plaintiff's portion of those damages falls to be reduced, having regard to his share in the responsibility for the death of his wife.

I am very conscious of the fact that all the opinions expressed on this question by eminent writers, and, as the Lord Chief Justice has pointed out, by eminent judges in Canada, are to the effect that a

reduction in the plaintiff's portion of the damages should be made. I appreciate the sense of the proposition that to the extent that the plaintiff was responsible for the death of his wife he should not recover damages from the defendant. Nevertheless, I have failed to appreciate on what legal grounds the defendant is entitled to claim that the plaintiff's damages should be reduced.

To make clear what my difficulty is I propose to look at what, in my view, are the legal grounds for liability in each of the cases now before us.

In the case where the plaintiff claims damages for personal injuries the defendant is liable to the plaintiff, because of his failure to take reasonable care for the safety of the plaintiff. The plaintiff himself is liable to the defendant because of his failure to take reasonable care for the safety of the defendant. If, apart from any duty towards the defendant, the plaintiff had been wanting in care for his own safety, this would have enabled the defendant to rely on the defence of contributory negligence. This plea would be relevant because the plaintiff's claim is in respect of personal injuries. Having regard to the nature of the claim (i.e. for personal injuries to the plaintiff) the finding of the jury that the plaintiff was guilty of negligence is sufficient to bring the case within section 2(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948 and to entitle the defendant to claim that the plaintiff's damages be reduced.

In the case where the plaintiff claims on behalf of the estate of his deceased wife under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, the position is as if the wife herself was bringing the action. It is her right of action that has survived. Accordingly the legal ground for the defendant's liability is his failure to take reasonable care for the safety of the plaintiff's wife. As the claim is based on personal injury to the plaintiff's wife she would have been liable to the defendant, had she lived, for any failure to take care for the defendant's safety. This could have arisen if she had been in any way responsible for the driving of the plaintiff's car, and, in such circumstances and apart from any duty towards the defendant, the wife's want of care for her own safety would have enabled the defendant to rely on the defence of contributory negligence. Negligence towards the defendant, or contributory negligence on the part of the wife, would have brought the case within sections 2(1) and (4) of the Law Reform Act, 1948, so that the defendant could have claimed to have the amount of damages reduced. The plaintiff's negligence either towards the defendant or towards his wife is irrelevant. He is in

any event suing as a representative and not in his personal capacity. The appropriate relief the defendant might claim as against him would be to sue him as a tortfeasor. But this relief is not open to the defendant as it is based on the negligence of the plaintiff towards his wife and for that he cannot be sued: see *Chant v. Read*[1]. If the defendant could establish that his negligence, for which he is liable to pay damages to the estate of the plaintiff's deceased wife, was due to the negligence of the plaintiff, that might give him a cause of action against the plaintiff as was suggested in *Drinkwater v. Kimber*[2].

Now we come to the case in which the claim is under the Fatal Accidents Acts 1846-1908.

The right of action is given to each of the dependants of the plaintiff's deceased wife, including the plaintiff himself. It is not the right of action that the wife had. But the important point I wish to stress is that it is an action for damages against the defendant *based on his failure to take care for the safety of the plaintiff's wife*. That appears to me to be clear from the wording of section 1 of the Fatal Accidents Act 1846: "Whensoever the death of a person shall be caused by "wrongful act, neglect, or default, and the act, neglect, or default is "such as would (if death had not ensued) have entitled the party "injured to maintain an action and recover damages in respect "thereof, then and in every such case the person who would have "been liable if death had not ensued shall be liable to an action for "damages, notwithstanding the death of the person injured....". The defendant could only have been made liable to the plaintiff's wife (had she not died) on the basis of his failure to take care for her safety. Accordingly, that must also be the basis of the defendant's liability to each of the dependants of the plaintiff's deceased wife, including the plaintiff. This is recognised by Lord Dunedin in *British Electric Railway Co. Ltd. v. Gentile*[3] when he says: "....it is "an action which can only exist if certain conditions precedent are "fulfilled. The first is that the death shall have been caused by "wrongful act, neglect, or default of the defendants. ....The second "is that the default is such 'as would if death had not ensued have "'entitled the party injured to maintain an action and recover "'damages in respect thereof' ".

Accordingly, the dependants, including the plaintiff, are enabled by the statute to do what they could not otherwise have done, claim damages from the defendant for his negligence, not towards them,

1 [1939] 2 K.B. 346.
2 [1952] 2 Q.B. 281.
3 [1914] A.C. 1034, 1041.

but towards the deceased. He owed no duty to the dependants to take care for the safety of the plaintiff's wife. That this is the basis on which the defendant can be made liable is further emphasised by the provision in section 2(4) of the Law Reform Act, 1948, that: "Where "any person dies as the result partly of his own fault and partly of "the fault of any other person or persons, so that if an action were "brought for the benefit of the estate of the deceased person, the "damages recoverable would be reduced under subsection (1) of this "section, any damages recoverable in an action brought for the "benefit of the dependants of that person under the Fatal Accidents "Acts, 1846 to 1908, shall be reduced to a proportionate extent".

The liability of the defendant is clear once it is established that he was negligent towards the plaintiff's wife. The defendant was also negligent towards the plaintiff but that has nothing to say to the case. It is only relevant where the plaintiff is claiming damages for his own personal injuries. The plaintiff was negligent towards the defendant but that, also, has nothing to say to the case. It is only relevant where the defendant is claiming damages for personal injuries or for damage to his property or as an answer to the plaintiff's claim against the defendant for damages for the plaintiff's personal injuries or for damage to the plaintiff's property. The only negligence on the part of the plaintiff that could be relevant where the plaintiff claims as a dependant of his deceased wife is, in my view, his negligence towards his wife. Accordingly, all the defendant can claim is that the plaintiff, as well as the defendant, was negligent towards the plaintiff's wife. But as his wife could not have sued the plaintiff for such negligence I can find no legal grounds on which anyone else can make the plaintiff liable therefor. It seems to me that the true legal position as between the plaintiff and the defendant is that each is a tortfeasor *vis-a-vis* the plaintiff's wife and that the defendant is precluded from seeking contribution from the plaintiff because the plaintiff cannot be sued for negligence towards his wife: see *Chant v. Read*[1] to which I have already referred. The "fault" of the plaintiff, in the circumstances of the cases before us, within the meaning of section 2(1) of the Law Reform Act 1948, must be either "negligence" or "contributory negligence"—according to the definition of "fault" in section 6(1) of the Act. For the reasons I have given this subsection, in my opinion, refers to negligence which consists of a duty to take care for the safety of the defendant, or, contributory negligence, which consists of a want of care (apart from any duty owed to the

[1] [1939] 2 K.B. 346.

defendant) to take care for plaintiff's own safety or the safety of his property.

As I have endeavoured to show, neither the negligence nor the contributory negligence contemplated by the Act is, in my opinion, relevant in the action brought by the plaintiff as a dependant of his deceased wife. If I am right in this opinion it follows that the defendant cannot succeed in his claim to have the plaintiff's portion of the damages, under the Fatal Accidents Acts, reduced. I would confine the jury's answer to question 3 to the first action, in which the plaintiff claims damages for personal injuries. I would expunge questions 6 and 8 and/or the jury's answers thereto. I would give the plaintiff judgment in accordance with the jury's answers to the remaining questions.

McVeigh J.: The relevant facts in this case are fully set out in the judgment of the Lord Chief Justice and there are none which I propose to add. I am in agreement with the Lord Chief Justice and Curran L.J. that there was adequate evidence upon which the jury could find that the plaintiff was guilty of negligence and that such negligence partly caused the accident, and that the parties were to blame in the proportions set out in the answers to the questions.

I would also agree with the conclusion reached by both the Lord Chief Justice and Curran L.J. that the damages awarded under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, are not reducible under section 2(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948.

I further agree with the Lord Chief Justice and Curran L.J. that the action under the Fatal Accidents Acts, 1846 to 1908, is one given to individuals and not to a class and is not a representative one on behalf of the estate of the deceased. If it is correct to reduce the share of the damages awarded under the Fatal Accidents Acts, 1846 to 1908, to the plaintiff as a dependant, then I agree with the Lord Chief Justice, and for the reasons given, that the proper computation is that set out in his judgment. This preamble now brings me to the interesting and important point, namely, whether damages awarded to the plaintiff as a dependant fall to be reduced under section 2(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948. This subsection reads as follows: "Where any person suffers "damage as the result partly of his own fault and partly of the fault "of any other person or persons, a claim in respect of that damage "shall not be defeated by reason of the fault of the person suffering

"the damage, but the damages recoverable in respect thereof shall be "reduced to such extent as the court thinks just and equitable having "regard to the claimant's share in the responsibility for the damage".

"Fault" is defined in section 6(1) as meaning "negligence, breach "of statutory duty or other act or omission which gives rise to a "liability in tort or would, but for this Act, give rise to the defence of "contributory negligence".

The first point which arises for consideration in construing this section is as to the scope of the word "damage" in subsection (1). This word is defined in section 6(1) as follows: " 'damage' includes "loss of life and personal injury". Thus the plaintiff in this case argues that "damage" has no larger meaning than "loss of life, "personal injury or damage to property", and that, as the plaintiff in his claim under the Fatal Accidents Acts, 1846 to 1908, has suffered none of these, therefore section 2(1) does not apply to him, and on that ground the amount awarded to him under the said Acts is not reducible. In support of this proposition there is cited the decision of Devlin J. in *Drinkwater v. Kimber*[1] where he expresses the view that the word "damage" in the parallel English Act means "physical damage", and does not include "financial loss". But one must be careful to realise that the learned judge was not there dealing with a case under the Fatal Accidents Acts, 1846 to 1908, and the type of "financial loss" he was considering was the loss occasioned by the defendant having a judgment against him. I would not be prepared to assume that Devlin J. would have excluded a claim under the Fatal Accidents Acts, 1846 to 1908. However, in the Court of Appeal[2] Morris L.J., as he then was, suggests a wider meaning for the word "damage" where he says after reciting the definition: "The "omission further to define that word was probably for the reason "that the word is one which is well understood in legal parlance as "being in many cases one of the elements to be proved in establishing "liability in law. A plaintiff, for example, who shows that a defendant "was guilty of some negligent act or omission towards him must also "show that damage resulted to the plaintiff which was not too "remote a consequence of the defendant's conduct..... It seems "clear that the word 'damage' refers to that which is suffered and for "which a 'claim' may be made, and for which 'damages' are recover-"able". He then points out why the claim for financial loss in that case could not be aptly brought within the section. It appears that both members of the Court of Appeal who gave judgment were

[1] [1952] 2 Q.B. 281. [2] Ibid. 293.

prepared to give a wider meaning to the word "damage" than Devlin J.: see per Singleton L.J.[1] and Morris L.J. as already cited. I can find nothing in the Court of Appeal decision in *Drinkwater's* case[2] which would prevent one concluding that "damage" includes the kind of "damage" suffered in a Fatal Accidents Act case. I would, accordingly, hold that the word "damage" includes those elements which form the basis of the claim in this case under the Fatal Accidents Acts, 1846 to 1908.

The next point is as to whether this is a case which can be said to come within section 2(1) on the ground that the damage was suffered by the plaintiff "as the result partly of his own fault and partly of the "fault of any other person", viz., the defendant. The answer to this depends partly on the construction of section 2(1) and partly on the findings of the jury.

One should perhaps look shortly at the historical background to this section and see whether, prior to the passing of the 1948 Act, contributory negligence of a dependant could defeat his claim under the Fatal Accidents Acts, 1846 to 1908. Always one must remember that the 1948 Act has its own definition of its ambit which must be followed whether or not it accords with the common law principle on the matter.

What the common law rule seems to deal with is preventing a person recovering damages if his own want of care has brought about or contributed to the damage or, alternatively expressed, he is not to lose his remedy for damages unless his own want of care has brought about or contributed to the situation which caused the damage.

Lopes L.J. in *The Bernina*[3] states that it is undisputed law that a plaintiff cannot recover damages for an injury to which he has directly contributed, and Greer L.J. in *Craze v. Meyer-Dunmore Ltd.*[4] says contributory negligence means such as "causes or contributes to "the injury or damage which has happened".

The scope of the rule can be also stated by saying that "where the "damage was the result of the fault of both parties the whole action "failed". See per Lord Wright in Modern Law Review, 1950, vol. 13, p. 2. This means, in my view, that where the plaintiff sues for damage caused to him by the defendant's negligence and for which he has a right of action whether at common law or by statute, then the rule

[1] [1952] 2 Q.B. at 290.
[2] Ibid. 281.
[3] (1887) 12 P.D. 58, 96-7.
[4] [1936] 2 All E.R. 1150, 1151.

operates to say that in such circumstances any effective fault on the plaintiff's part prevents him recovering damages.

The point as to whether contributory negligence affords a defence in a claim under the Fatal Accidents Acts, 1846 to 1908, has never yet been decided in this country, but in *Trueman v. Hydro Electric Commissioners*[1], a case very similar on its facts to those in the present case, the Appellate Division of the Ontario Supreme Court held that the husband's claim in that case as a dependant was defeated on the ground of contributory negligence by him. The basis of this was that there lies at the root of the doctrine of contributory negligence the rule that to allow a person guilty of such negligence to recover for his loss would be to ignore the rule that he is the author of his own wrong: see per Ferguson J.A.[2]. It is said that "Such a person sues pro "tanto for his own benefit and is met with the answer that as to that his "own negligence was one of the effective causes of the death and his "consequent loss.": see per Hodgins J.A.[3]. Where a plaintiff is the author of his own wrong he cannot therefore recover. The foundation for this statement is the recognition that the plaintiff in order to recover had to prove that the negligence of the defendant was the sole cause of the damage and if the plaintiff was guilty of negligence materially contributing to the injury he failed to establish this. The action of a plaintiff dependant under the Fatal Accidents Acts, 1846 to 1908, is one in which he claims to recover damages which he personally sustains—the whole being for the *injury* resulting to him from the death of the deceased. Thus where the negligence of a plaintiff dependant materially contributes to the damage, there seems no reason to exclude, so far as his own damages are concerned, the common law principle that he must fail if he is the author whether in whole or in part of his own *injury*. It is said that the weight of authority in the United States is in favour of this view: see Glanville Williams on Joint Torts and Contributory Negligence (1957) p. 443. In *Trueman's case*[1], the plaintiff was found guilty of negligence which was itself an effective or proximate cause of the injury which he had sustained and for which the Fatal Accidents Acts, 1846 to 1908, or the similar Canadian legislation had given him a statutory cause of action.

The consequence of the defendant's negligence in *Trueman's*[1] case was the death of the plaintiff's wife resulting in damage to the plaintiff. He could have avoided these consequences by taking

[1] [1924] 1 D.L.R. 405. [3] [1924] 1 D.L.R. at 419.
[2] [1924] 1 D.L.R. at 424.

reasonable care. The doctrine depends on a finding of negligence meaning breach of duty on the part of the one against whom the action is brought, but also negligence, meaning at least a contributory act or omission, on the part of the person suffering the *injury*. I am prepared to accept that the decision of the majority in *Trueman's* case[1] was correct. It would be surprising if the negligence which defeats the plaintiff's claim under the pre-1948 law would not be such as would now under the 1948 Act bring about a reduction of the plaintiff's damage having regard to his share in the responsibility for that damage. This, however, depends on the meaning to be given to section 2(1) of the 1948 Act. The effect of the Act is put by Denning L.J., as he then was, in *Davies v. Swan Motor Co. Ltd.*[2] as follows: "The legal effect of the Act of 1945 is simple enough. If the plaintiff's "negligence was one of the causes of his damage, he is no longer "defeated altogether. He gets reduced damages". The practical effect, he says, is that "the courts have regard to all the causes and apportion "the damages accordingly". And later he says[3]: "Speaking generally, "therefore, the questions in road accidents are simply these: What "faults were there which caused the damage? What are the pro- "portions in which the damages should be apportioned having "regard to the respective responsibilities of those in fault?" A broad view may be taken, common sense rather than rigorous logic now reigns—see the position as stated in Salmond on Torts, 11th ed., pp. 535, 536.

I should perhaps at this point pause to look at the phraseology used when discussing "negligence" and "contributory negligence". It would appear that the contributory negligence of a plaintiff does not necessarily connote the breach of a legal duty on his part: see this point clearly put by Lord Simon in *Nance v. British Columbia Electric Railway Co. Ltd.*[4]. From this it is clear that a defendant who pleads contributory negligence does not have to prove that the plaintiff was guilty of the breach of any legal duty; all that he requires to do is to show that the plaintiff was guilty of that kind of negligence which consists in a failure to take reasonable care to avoid the consequences of the defendant's negligence. There can be no doubt that this kind of conduct is frequently referred to as "negligence "materially contributing to the injury" or some similar phrase; indeed, such kind of act or omission on the part of the plaintiff "may properly be described as negligence although negligence is not "given its usual meaning", see Charlesworth, 3rd ed. p. 507. Thus, an

[1] [1924] 1 D.L.R. 405.
[2] [1949] 2 K.B. 291, 322.
[3] Ibid. 326.
[4] [1951] A.C. 601, 611.

act or omission may be the type of negligence which is contributory (but does not involve breach of a legal duty to the defendant) or may be negligence which does involve such a duty and could found an action in tort. The plaintiff who is guilty of contributory negligence in running down cases almost always owes a duty to the defendant. The contrast between the two meanings of negligence is recognised in the definition of "fault" in section 6(1) of the 1948 Act: see per Lord Simon in *Nance's* case[1]. Thus, a question designed to ascertain whether the plaintiff in such a case was guilty of contributory negligence would not, in my view, be wrongly framed by asking "was the accident partly due to negligence on the part of the plaintiff" provided that it was explained to the jury what the defence of contributory negligence involved. There is no complaint here that the learned trial judge misdirected the jury on the issue of contributory negligence, and, no doubt, he lucidly explained it. It seems to me that the questions were adequate to try this case and the jury found both parties partly negligent.

In my view the same acts or omissions which operated to reduce the damages in the plaintiff's claim for his own personal injuries would also operate to reduce the damages in his claim for his own personal loss under the Fatal Accidents Acts, 1846 to 1908. These acts or omissions did not have to amount to breaches of a legal duty, but in the present case, so far as I can see, they were also breaches of a legal duty to the defendant. However that may be, whether they be negligence in its ordinary sense (i.e. raising a legal duty to the defendant) or acts or omissions (not raising such a duty) which would, prior to the Act, have given rise to the defence of contributory negligence, they fall, in my view, within the definition of "fault" in section 6(1) of the 1948 Act. I would also hold that the plaintiff was guilty of negligence giving rise to a liability in tort.

Accordingly, I would hold that this is a case which falls within section 2(1) of the 1948 Act and that the plaintiff is a person who has suffered damage as the result partly of his own fault and partly of the fault of the defendant and that, accordingly, the plaintiff's damages under the Fatal Accidents Acts, 1846 to 1908, fall to be reduced in accordance with the jury's finding as to the claimant's share in the responsibility for the damage.

I have formed the opinion, as already set out, that the nature of the plaintiff's action is a personal and individual right given to him by statute, and is not a claim derived from the deceased wife and that it

[1] [1951] A.C. 612.

does not raise any question of contribution between tortfeasors, although, indeed, it seems that both the plaintiff and defendant were guilty of breaches of duty towards plaintiff's wife. Accordingly, I do not see how *Chant v. Read*[1], a case relating to right of contribution under the Tortfeasors Act 1937, can have any relevance here. In no sense having regard to my decision on the nature of this claim can I find that this suit is affected in any way by the disability of a husband or wife to sue the other in tort. This is a claim by the plaintiff in his own right for loss accruing to him and he is met with the defence of his own contributory negligence. These issues do not introduce in any way the disability mentioned.

I agree to the form of order suggested by the Lord Chief Justice both as to the amounts and costs.

Appeal allowed in part.

Solicitor for the plaintiff: *H. McPartland.*

Solicitor for the defendant: *H. J. Catchpole.*

J.P.

[1] [1939] 2 K.B. 346.

REGINA (BURNS) v. COUNTY COURT JUDGE OF TYRONE[1]

Certiorari—Bastardy - Affiliation order—Adjudication obtained by fraud—Perjury by witness—Party seeking order acquitted of subornation of perjury—whether certiorari will lie.

Subsequent to the granting of an affiliation order at petty sessions, two of the corroborating witnesses were convicted of perjury. The applicant for the order was herself charged with subornation of perjury but was acquitted. The party against whom the affiliation order had been made sought to have it quashed on certiorari on the ground that it had been obtained by fraud.

Held, that where an order is obtained by perjured evidence, certiorari will lie whether or not the party obtaining the order was privy to the perjury.

Reg. v. Ashford Justices [1956] 1 Q.B. 167 distinguished.

MOTION to make absolute a conditional order that a writ of certiorari should issue directed to the County Court Judge of Tyrone, to remove into the Queen's Bench Division for the purpose of being quashed, the adjudication and order of the county court judge made on an application under the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924.

The following statement of facts is taken substantially from the judgment of the Lord Chief Justice.

In February 1959, Ethel Patterson of Sion Mills, County Tyrone, (hereinafter called "the complainant") sought an affiliation order under the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924, against Columba Burns, a plasterer, who resides near Strabane in the same county, and who, according to the complainant, was the father of her infant child. Burns, the prosecutor in the certiorari proceedings and the applicant in this matter, is, for convenience referred to hereinafter as "the defendant".

The affiliation proceedings were heard at Strabane Petty Sessions on March 12, 1959. The complainant failed to adduce corroborative evidence as required by the statute, and the resident magistrate dismissed her application at the conclusion of her case and without calling upon the defendant. The complainant then appealed to quarter sessions. This appeal was heard by the county court judge on April 14, 1959. At the hearing the complainant called three witnesses in support of her case who had not given evidence at petty sessions. Of the three, William Nelson and Patrick Eamon Ramsey were farm labourers living in or near the complainant's district. The third was Robert Patterson, a brother of the complainant, who lives in County Antrim, near Belfast. It is necessary to refer to the substance of the

[1] In the Queen's Bench Division before Lord MacDermott L.C.J. and Sheil J.: Nov. 25, Dec. 8, 1960.

testimony given by these witnesses. Nelson swore that he had visited the defendant's house with the complainant's brother, Robert Patterson, and that he had heard the defendant then say that he was going to marry the complainant because he was the father of her child and that they would go to live in Belfast. Ramsey swore that he had seen the complainant and the defendant down at the "Plantin", a place near the Mourne River, and that they were then in a compromising position. Robert Patterson swore to the effect that in May 1958, being aware that the complainant was pregnant, he asked Nelson to come with him and show him the house of the defendant as he, Patterson, did not know where the defendant lived; that Nelson took him to the end of a laneway and shortly afterwards brought down the defendant; that the defendant, when taxed with being the father of the expected child, admitted that he was; and that he said he was going to marry the complainant, and had suggested that when married they could live with Robert Patterson until they got a house. The county court judge also heard the defendant, who denied that he had had intercourse at any time with the complainant. The county court judge gave his decision on May 1, 1959, when he found that the complainant's evidence was corroborated, and ordered the defendant to make a payment of 15 shillings a week.

The defendant did not make the payments ordered and the question of his commital arose. This directed attention to the testimony of Nelson and Ramsey, and the police commenced inquiries which resulted in these two being charged with perjury and the complainant being charged with subornation as respects the perjury of Ramsey. These charges came on for trial at the winter assizes on February 1, 1960. Nelson and Ramsey pleaded guilty to having committed perjury at quarter sessions; the complainant pleaded not guilty and the jury were directed to acquit her on the ground that there was no satisfactory corroboration of the charge against her. No proceedings appear to have been taken against Robert Patterson.

The defendant then obtained a conditional order of certiorari to bring up and quash the adjudication at quarter sessions, and applied to the Divisional Court to have the conditional order made absolute. The complainant showed cause.

McDevitt for the prosecutor (the defendant at quarter sessions).

McConnell for the party showing cause (the complainant at quarter sessions).

Cur. adv. vult.

LORD MACDERMOTT L.C.J. stated the facts as set out above and continued: In my opinion there can be no doubt that certiorari will lie to bring up and quash orders of inferior courts which have been procured by fraud, and that this includes orders procured by perjury. See *Reg. v. Gillyard*[1] and *R. v. Recorder of Leicester*[2]. But it is no less clear that this jurisdiction will not be exercised where the material facts and issues are in dispute or otherwise than manifest and clear: see *Colonial Bank of Australasia v. Willan*[3]. This court cannot rehear the case or come to a conclusion between one version of the facts and another.

These limitations, however, have no bearing on the present application. It is beyond controversy that the corroborative evidence given by Nelson and Ramsey was perjured and of no probative value whatsoever. Each of these witnesses made a full confession. Both pleaded guilty of perjury in respect of the evidence they had given; and both have adhered to this attitude in the affidavits which they have sworn to obtain the conditional order while serving their sentences. The insufficiency of the evidence of these witnesses as corroboration of the complainant's story was frankly conceded by Mr. McConnell who appeared for the complainant. Mr. McConnell contended, however, that notwithstanding this the learned county court judge had, in the evidence of the complainant's brother, Robert Patterson, sufficient corroboration to justify his decision. It is not for us to weigh one piece of testimony against another, and I would consider this a strong point against the present application if the evidence of Robert Patterson could be regarded as independent of the admittedly perjured evidence. But Robert Patterson's evidence cannot be so regarded. His testimony is completely linked with that of Nelson and must fall with it. It is inconceivable that the learned county court judge would have found the necessary corroboration in the evidence of Nelson and Ramsey if he had known of their perjury, and it is no less certain that, on the same hypothesis, Robert Patterson's evidence would not have been accepted as corroborative. In this state of affairs I have no hesitation in reaching the conclusion that the order of quarter sessions was manifestly and beyond any question obtained by the perjury of Nelson and Ramsey.

It was suggested, on behalf of the defendant, that this court could infer from the material before it that the complainant was a party to this perjury and was active in procuring it in order to bolster up her

[1] (1848) 12 Q.B. 527.
[2] [1947] K.B. 726.
[3] (1874) L.R. 5 P.C. 417, 450.

case. The circumstances are indeed suspicious and the perjury came from witnesses whose attendance was arranged for by her or on her behalf. But the complainant was acquitted of subornation and, far from admitting any participation in the fraud which was practised, has protested her innocence on affidavit. This is just the sort of issue which cannot be settled by this court on certiorari, and I must proceed on the basis that, although the order of quarter sessions was procured by perjury, it was not procured by perjury committed at the complainant's instigation or with her knowledge.

This brings me to the main point of the case. To allow of certiorari, is it sufficient to show that the challenged decision was procured by perjured evidence, in the sense that without such evidence that decision manifestly would not have been given? Or is it necessary to show, in addition, that such perjury was instigated, or at any rate connived at, by the party who sought the challenged decision? In contending that the latter is the test, Mr. McConnell referred to several dicta in the recent case of *Reg. v. Ashford Justices*[1]. In that case certiorari was refused on the application of a defendant, against whom an order had been made in affiliation proceedings. The facts are so different from those of the present case that I need not enter upon them further than to say that the alleged perjury was that of a witness called by the defendant and that the court took the view that the case was not clear and manifest. But Singleton L.J. says[2]: "This "court ought not to grant an order of certiorari merely because a "witness—particularly a witness called for the side seeking the order "—has committed perjury. The fact that Ricket [the witness] was "convicted does not establish guilt on the part of Miss Mann [the "complainant]; and unless she committed perjury or was in some "way or other a party to fraud, the application for an order of "certiorari ought not to succeed". Then, in the judgment of Parker L.J. there is this passage[3]: "But one thing is clear, and that is that "there is no case to which counsel have been able to refer us in which "certiorari has lain where the fraud or perjured evidence is that of a "witness called by one of the parties, unless, of course, it is also shown "that that perjured evidence was given in collusion with one of the "parties. That, indeed, was the position in the *Recorder of Burnley* "case[4], where one of the witnesses called by the appellant on appeal "was shown to have committed perjury, but to have committed it in "collusion with the appellant".

1 [1956] 1 Q.B. 167.
2 Ibid. 175.
3 Ibid. 178.
4 Unreported, referred to in 98 J.P. Jo. 315.

It must also be observed that in *Reg. v. Gillyard*[1] Lord Denman C.J. says: "If it were necessary, we ought, in such a case, to create a "precedent, in order that persons who have set the law in motion for "fraudulent purposes may understand that, if they are charged with "such an offence, they will be expected to answer the accusation".

In *R. v. Recorder of Leicester*[2] the perjury was that of an appellant to quarter sessions, who succeeded by his perjury in getting an affiliation order reversed which had been made against him by the Leicester Justices. In the course of his judgment Lord Goddard C.J., after remarking that "certiorari is a remedy of a peculiar character "and there is a great deal of authority as to when it will and when it "will not lie", says[3]: "It is unnecessary in the present case to consider "whether certiorari would lie if the perjury had been committed by a "respondent to an appeal, though I am inclined to think that it "would. At any rate in this case perjury has been admitted by the "person who set the appeal in motion and obtained thereby the "order which it is now sought to quash. In those circumstances I "think the order for certiorari must go and the order of the recorder "must be quashed, with the result that the order of the justices "remains".

As Parker L.J. observes in the *Ashford Justices* case[4], there seems to be no reported instance in which certiorari has been held to lie where the only fraud alleged was the unsolicited perjury of a witness called by one of the parties. In my opinion, however, neither this absence of authority, nor that decision, ought to be taken as meaning that the law does not permit of the granting of certiorari in a case such as the present. For one reason, I do not think the absence of authority is, in the circumstances, really significant. Most of the decisions on certiorari have been of a criminal nature and it has, I think, been the practice in that branch of the law to deal with convictions on perjured evidence by the exercise of the Prerogative. Secondly, the difficulty of proving beyond question that a decision was procured by perjury is usually sufficiently formidable to constitute a likely explanation for the paucity of cases. And thirdly, I think the decision in the *Ashford Justices* case[4] must be related closely to its somewhat unusual facts. The dominant reason for the decision of the Court of Appeal in that case appears to have been that the effect of the perjury on the decision in question was a matter in

[1] (1848) 12 Q.B. at 529.
[2] [1947] K.B. 726.
[3] [1947] K.B. at 728.
[4] [1956] 1 Q.B. 167.

dispute and anything but manifest and clear. The dicta I have quoted from this case are entitled to every respect, but I do not think they were intended to describe the real ratio decidendi.

Here we have an order undoubtedly obtained by the perjured testimony to which I have referred, and it is clearly in the interest of the due administration of justice that it should not stand. The supervisory jurisdiction of this court is not at large; but the general aim of that jurisdiction is to promote the due administration of justice, and if a distinction is to be drawn between cases where a decision is procured by perjury and cases where a decision is procured by perjury to which one of the parties is privy, it ought to rest on some basis of principle. I am unable to discern any such basis here. Litigation between parties, whether civil or criminal, does not necessarily mean that there are not others anxious or interested to sway the issue one way or the other, and it would, I think, be a grave defect in the procedure of this court if one of these forms of fraud could be noticed but not the other. I can find no rational ground for the sort of discrimination which must prevail if we are to accede to the submission under discussion. If certiorari does not lie in such circumstances there is no other redress and an order undoubtedly founded on perjury remains effective. In my view this court is not bound to accept that situation merely because of a lack of authority. Though the main branches of certiorari have long since been shaped and fixed by precedent, they are still alive and capable of growth in the furtherance of their established purposes. In my opinion, the distinction relied upon by Mr. McConnell is more apparent than real and of no weight or relevance as respects the due administration of justice. This order has manifestly been procured by fraud and that, I think, is enough to allow this court to intervene. I would, therefore, make the conditional order absolute, so that the decision of quarter sessions may be quashed and the order at petty sessions restored.

SHEIL J.: In this case the prosecutor, Columba Burns, seeks to have made absolute a conditional order of certiorari dated May 27, 1960, directed to the County Court Judge of County Tyrone, to remove into this court for the purpose of being quashed an order and adjudication made by the learned county court judge at Omagh on May 1, 1959. It will be seen that the ordinary period for applying for such conditional order had long expired, but in the peculiar and unusual circumstances I extended the time.

The circumstances are indeed unusual, and, so far as my knowledge goes, quite unprecedented. One Ethel Patterson made an

unsuccessful application to the learned resident magistrate at Omagh on March 12, 1959, for an order under the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924, against the defendant, the present prosecutor. She appealed to the county court judge and on May 1, 1959, the learned county court judge reversed the decision of the resident magistrate and made an order for weekly payments against the defendant. That order recited that, the court having heard the evidence of the complainant and other evidence satisfactorily corroborating in a material particular her evidence, the judge was satisfied of the truth of the said complaint. This recital was in accordance with the provisions of section 1(3) (c) of the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924. It will be noticed that the Act states that the court shall not make an order unless such corroborative evidence is given.

Apparently such corroboration was not forthcoming at the petty sessions, but on the hearing of the appeal, evidence which, if true, afforded ample corroborative evidence, was produced. Three witnesses, William Nelson, Patrick Ramsey and Robert Patterson (the last-named being a brother of the girl) gave evidence and were apparently believed. The learned county court judge had no reason to disbelieve that evidence, but subsequently the witnesses Nelson and Ramsey admitted that their evidence was untrue. They not merely admitted it but in respect of their evidence each of them pleaded guilty to a charge of perjury at the Northern Ireland Winter Assizes, 1960, and they were sentenced to imprisonment. Not only that but each has made an affidavit from H.M. Prison in Belfast repeating that their evidence was false. Whatever may have been their motives in giving such false evidence, (and there is dispute about that), it is not disputed in this court that their sworn evidence before the county court judge was untrue.

As to Robert Patterson, who did not give evidence at petty sessions, it is to be said that he at quarter sessions and again in this court by affidavit asserted that he had been in the company of Nelson when the prosecutor admitted paternity. This very allegation was one of the matters in respect of which Nelson admitted that he, Nelson, had given false evidence, and he has repeated that admission on affidavit. We were told by counsel for Ethel Patterson that according to his, counsel's, instructions the reason why Robert Patterson did not give evidence at petty sessions was that he was ill. I do not doubt that those were his instructions, but as counsel for the prosecutor has

pointed out, it is significant that although the prosecutor's affidavit stresses that neither Nelson nor Ramsey nor Patterson gave evidence at petty sessions, and although Robert Patterson made an affidavit in this matter he does not at all mention why he did not give evidence at the petty sessions.

To my mind it is clear beyond all doubt that the learned county court judge accepted the evidence of these three witnesses. In respect of two of them, we now know that their evidence was false and worthless as corroborative evidence. But while admitting that, Mr. McConnell for the mother relies on the evidence of Robert Patterson who still adheres to his story of the alleged visit of Nelson to the prosecutor's home and that the prosecutor in the presence and hearing of Patterson and Nelson admitted paternity. In view of the fact that Nelson is undergoing imprisonment for having falsely sworn this same thing, and in view of his affidavit, it seems to me that the evidence of Patterson has been so tainted, if not vitiated, that it must be regarded as worthless from the point of view of corroboration. To put it another way, I am wholly satisfied that if the learned county court judge had known the facts as we now know them, he would have considered the evidence of Patterson as so bound up with that of Nelson as to be incapable of independent consideration.

In such circumstances, what is this court to do? To deny the order, if we think the prosecutor has made a case for it, is to deny him all relief, for he cannot again appeal to quarter sessions.

There has been cited to us the case of *R. v. Ashford Justices*[1] and our attention has been drawn particularly to certain dicta of Jenkins L.J. and of Parker L.J. Jenkins L.J. states[2]: "I would not attempt to "state exhaustively the requirements that should be insisted on as "regards the state of the facts underlying an application of this sort, "but, without attempting to lay down any general rule, I venture to "say that I think an order of certiorari to quash proceedings on the "ground that they were procured by fraud or perjury should seldom "if ever be made unless the facts regarding the alleged fraud or "perjury have either been the subject of a conviction in regular "criminal proceedings against the person to whom the fraud or "perjury is imputed, or else have been admitted by something "amounting to a confession by such person". Parker L.J. says[3]: "But one thing is clear, and that is that there is no case to which

[1] [1956] 1 Q.B. 167.
[2] Ibid. 177.
[3] Ibid. 178.

"counsel have been able to refer us in which certiorari has lain where "the fraud or perjured evidence is that of a witness called by one of "the parties, unless, of course, it is also shown that that perjured "evidence was given in collusion with one of the parties".

These dicta require and deserve the greatest respect, but even in those dicta it is to be seen that the Lords Justices are not laying down a universal rule which must be definitive for all time.

I do not see that in the circumstances of this case those dicta are binding, even though in this case the mother was by direction of the Lord Chief Justice found not guilty of subornation of perjury. I venture to say that those learned judges, faced with the facts here presented, would unhesitatingly come to the conclusion that the adjudication made in this case was wrong and that the order here sought should go. That is my opinion, for here there was not any evidence corroborating that of the mother in a material particular to the satisfaction of any court.

The conditional order should be made absolute.

Order absolute.

Solicitor for the prosecutor: *G. J. McCanny.*

Solicitor for the party showing cause: *R. H. O'Connor.*

S.M.M.

NATIONAL ASSISTANCE BOARD v. McENEANEY[1]

National Assistance—Money wrongfully obtained by misrepresentations—Question of amount referred to Appeal Tribunal—Certificate of Tribunal—Sufficiency of certificate to prove cause of action—Summary proceedings for recovery of amount—Accrual of cause of action—Whether time runs from date of certificate—National Assistance Act (Northern Ireland), 1948 (c. 13), ss. 22, 27—Finance (Miscellaneous Provisions) Act (Northern Ireland), 1955 (c. 19), s. 25.

By section 22 of the National Assistance Act (Northern Ireland), 1948: "(1) If, whether fraudulently or otherwise, any person misrepresents or fails "to disclose any material fact, and in consequence of the misrepresentation "or failure—(a) the Board incur any expenditure under this Act; or (b) any "sum recoverable under this Act by the Board is not recovered; the Board "shall be entitled to recover the amount thereof from the said person. "(2) If any question arises, whether in or in connection with any legal "proceedings or otherwise, as to the amount which the Board are entitled in "any case to recover under the last preceding sub-section, the question shall "be referred to the Appeal Tribunal. (3) On any reference under the last "preceding sub-section a certificate signed by the clerk of the Appeal "Tribunal setting forth the decision of the Tribunal upon the question "referred shall be conclusive evidence of the amount recoverable under "sub-section (1) of this section".

Held, by the Court of Appeal, (i) that section 22 of the Act of 1948 does not make mandatory a reference to the Appeal Tribunal under subsection (2) except where there is a question at issue as to the amount recoverable, and on such reference the Tribunal has no power to determine any issue other than that of quantum: accordingly a certificate given on such a reference is not prima facie evidence of liability; (ii) that the Board's right of action to recover sums due under subsection (1) does not depend on the decision of the Appeal Tribunal or its certification, and accordingly the issue of a certificate by the Tribunal is not a condition precedent to the bringing of proceedings under subsection (1).

The National Assistance Board by summons dated September 30, 1959, sought to recover from the defendant as a civil debt a sum alleged to have been obtained by means of misrepresentations between July 1951 and August 1958. The Board had referred to the Appeal Tribunal under section 22(2) of the Act of 1948 the question of the amount which the Board were entitled to recover, and the Tribunal had certified on September 3, 1959, that the amount of excess payments was £835 14s. 6d. On the hearing of the summons the certificate of the Tribunal was the only evidence submitted on behalf of the Board.

The defendant, conceding that the limitation period applicable was six years, contended that because the summons alleged excess payments over a period going back more than six years from the date of the summons and the Board had not shown what excess payments were within the period of limitation, the whole claim was statute barred. For the Board it was con-

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Nov. 28, 1960.

tended that no cause of action arose until the issue of the certificate by the Appeal Tribunal. The resident magistrate ruled that the production of the certificate from the Appeal Tribunal was prima facie evidence that the defendant had wrongfully obtained the sums claimed by misrepresentations; that the right to recover such payments did not accrue until the issue of the certificate on September 3, 1959; and that the Board's claim was not statute barred.

Held, by the Court of Appeal, (i) that the production of the certificate did not prove that the amount sued for had been wrongfully obtained by means of misrepresentation; (ii) that the accrual of any right of action which the Board might have was independent of the issue of the certificate; (iii) that as the Board had chosen to prove their claim by relying solely on a document which was completely insufficient to prove their claim it was not a proper course to remit the case, but the appeal should be allowed and the summons dismissed.

CASE STATED by the Resident Magistrate sitting at Crossmaglen Petty Sessions.

The facts of the case appear sufficiently in the headnote and in the judgment of Lord MacDermott L.C.J.

Kennedy for the appellant. If any right of action accrued to the Board, it accrued at the time when the alleged wrongful payments were made. If the Board's contention that its cause of action accrued only when the certificate of the decision of the Tribunal was issued, then no cause of action could accrue to the Board at all in the absence of a dispute as to amount, for under section 22(2) reference to the Tribunal is only to be made where a "question arises.... as to the "amount which the Board are entitled to recover".

I submit that the Appeal Tribunal was only intended by the Legislature to determine question as to the amount to be recovered but not any question relating to liability.

There are no cases bearing directly on this point but in *Baker v. Courage*[1] it was held that in an action for repayment of money paid under a mistake of fact, time began to run from the payment of the money, and not from the time when the mistake was or might reasonably have been discovered.

I submit that the certificate of the decision of the Appeal Tribunal in this case was not sufficient to support the findings of fact which the learned resident magistrate has sought to base upon it, and accordingly the summons ought to be dismissed, and dismissed on the merits. It should not be sent back to allow the Board to make its case in some other way: see *Taylor v. Wilson*[2]. [He referred also to *Price v. Humphries*[3] and *Haynes v. Davis*[4]].

1 [1910] 1 K.B. 56.
2 (1911) 76 J.P. 69.
3 [1958] 2 Q.B. 353.
4 [1914] W.N. 455.

Nicholson Q.C. and *McConnell* for the Board. The issue in this case depends on the proper construction of section 22(2) of the Act of 1948. If that subsection did not provide a complete code for the determination of all questions arising under the section, then it would seem that the appellant would be entitled to succeed.

We say, however, that section 22(2) does provide a complete code. The Act of 1948 deals with a large variety of payments, and some means of dealing with the details of different claims by the Board which might arise was necessary. When the circumstances are considered, we say it is almost impossible to avoid the conclusion that the whole matter relating to the determination of what is recoverable by the Board is committed to the Appeal Tribunal by section 22(2), and that that necessarily involves the determination by the Tribunal of all questions relevant to the issue, including questions as to liability and limitation of time. This view, we submit, is fortified by the wording "in or in connection with any legal proceedings or "otherwise".

[LORD MACDERMOTT L.C.J.: What then is the point of making the amount recoverable summarily as a civil debt?]

The function of the court of summary jurisdiction is to provide a means of obtaining judgment, the work of decision having been already done by the Appeal Tribunal.

[CURRAN L.J.: Can subsection (1) operate at all without a reference to the Tribunal?]

It could only do so if no question as to amount arose; in those circumstances there would seem to be jurisdiction, but in practice the question may never arise.

[CURRAN L.J.: If your argument is right it reduces the magistrate's function to that of a rubber stamp.]

[BLACK L.J.: Surely the operation of section 27(2) necessarily involves the opening up of the certificate?]

We would say that if the question whether a claim was statute barred were raised at petty sessions, the resident magistrate would, notwithstanding section 27(2), have to regard it as a "question arising "as to the amount recoverable by the Board", and refer it to the Appeal Tribunal. He would be bound to accept the certificate as evidence unless it were bad on its face and unless objection is taken to it.

[They referred to *Gibbs v. Guild*[1]; *Reg. v. O'Brien*[2]; *Cheshire C.C. v. Hopley*[3]].

LORD MACDERMOTT L.C.J. This appeal comes before us on a case stated by the Resident Magistrate sitting at Crossmaglen Petty Sessions who, on June 17, 1960, had to deal with a claim brought by the National Assistance Board to recover from the defendant, a person who had been in receipt of National Assistance, a sum of £835 14s. 6d. alleged to have been wrongfully obtained by the defendant by means of misrepresentations. When the summons, which is dated September 30, 1959, came on for hearing, the Crown Solicitor, on behalf of the Board, produced what purported to be a certificate given under section 22 of the National Assistance Act (Northern Ireland), 1948. It is clear that the proceedings had been instituted under that section and section 27 of that Act. The first three subsections of section 22 read as follows: "(1) If, whether "fraudulently or otherwise, any person misrepresents or fails to "disclose any material fact, and in consequence of the misrepresenta- "tion or failure—(a) the Board incur any expenditure under this "Act; or (b) any sum recoverable under this Act by the Board is not "recovered; the Board shall be entitled to recover the amount thereof "from the said person. (2) If any question arises, whether in or in "connection with any legal proceedings or otherwise, as to the "amount which the Board are entitled in any case to recover under "the last preceding sub-section, the question shall be referred to the "Appeal Tribunal. (3) On any reference under the last preceding "sub-section a certificate signed by the clerk of the Appeal Tribunal "setting forth the decision of the Tribunal upon the question "referred shall be conclusive evidence of the amount recoverable "under sub-section (1) of this section".

Section 27 has been amended by section 25 of the Finance (Miscellaneous Provisions) Act (Northern Ireland), 1955, and sub-section (1) of section 27 is now in the following terms: "(1) Without "prejudice to any other method of recovery, any sum due under this "Act to the Board shall be recoverable summarily as a civil debt".

By virtue of subsection (4) of section 22 of the Act of 1948 a certificate such as that produced in this case need not be formally proved. No evidence was adduced on behalf of the Board other than the contents of this certificate, which can only be described as a very

1 (1882) 9 Q.B.D. 59.
2 (1888) Judgments of the Superior Courts in Ireland, 269, 281.
3 (1924) 130 L.T. 123.

laconic document. It bears the title of the Act of 1948 and is dated September 3, 1959. By it the clerk of the Tribunal merely certifies that the question of the excess payment to the defendant was referred to the Tribunal in the prescribed manner on August 24, 1959, when the Tribunal decided that the amount of the excess payment was £835 14s. 6d. There is no reference to the period or periods in respect of which the excess payment or payments were made, no reference to any dispute as to the amount recoverable, and nothing to show how the matter came to be referred to the Tribunal: nor is there any disclosure respecting the nature of the excess payments or of any fraud, misrepresentation or non-disclosure of material facts alleged to have induced such payments.

The Board's evidence having ended with the production of the certificate, the resident magistrate heard argument on behalf of the parties. Mr. Collins, the defendant's solicitor, submitted that the Board's alleged right of action accrued on the dates when the excess payments were made and that, since the summons alleged that the payments were made between July 23, 1951, and August 30, 1958, and since there was no apportionment showing what payments had been made within the period of six years prior to the summons, the whole claim was statute barred. The Crown Solicitor agreed that the relevant period of limitation in the case was six years, but submitted that the Board's right of action did not accrue until the issue of the certificate by the clerk to the Tribunal on September 3, 1959. The resident magistrate, having considered these contentions, then found:—

(i) that the defendant had wrongfully obtained sums of money from the Board by means of misrepresentations from July 23, 1951, to August 30, 1958; and

(ii) that the amount of the excess payments was £835 14s. 6d.

He thereupon rules as follows:—

(a) that the production of the certificate was prima facie evidence that the defendant had wrongfully obtained National Assistance payments during the period from July 23, 1951, to August 30, 1958, by means of misrepresentations;

(b) that the right of action to recover said payments did not accrue until the issue of the certificate dated September, 3 1959; and,

(c) that the Board's claim was not statute barred and that they were entitled to a decree accordingly.

The question for this court is whether the resident magistrate was correct in law in these rulings.

With regard to (a), I cannot see anything to justify such a finding. As already observed, the certificate makes no mention of the period during which the payments were made; and it does not show how the excess payments came to be made, or state any facts which would indicate that there had been any misrepresentations or finding of misrepresentation. There is nothing in section 22(3) to make good these deficiencies. Whatever the scope of the Tribunal's powers may be under section 22—a matter to which I shall revert later—it seems to me that this certificate is quite inadequate to prove the complaint as stated in the summons, which describes the amount sued for as being "National Assistance wrongfully obtained by Elizabeth "McEneaney during the period from 23rd July, 1951, to 30th "August, 1958, by means of misrepresentations".

As to (b), if subsections (2) and (3) of section 22 are read as referring merely to questions of amount, I think it would be impossible to hold that a decision of the Tribunal, or the issue of a certificate as to such a decision, was a condition precedent to the commencement of proceedings under section 22. Apart from any other consideration, it seems to me clear that such proceedings might be brought and a decree given without any reference to the Tribunal becoming necessary, as such a reference is only mandatory in cases where a question has arisen "as to the amount which the Board are "entitled to recover". A case could well arise in which there was no question at issue as to the amount recoverable: and if that is so, it is not easy to see why a certificate must necessarily issue before a right of action can accrue to the Board. On the construction mentioned, therefore, I can find no ground for supporting ruling (b).

But the main argument of the Board on this branch of the case challenged this construction. It was, in effect, that under section 22(2) of the Act of 1948 the Tribunal is seised of the entire subject matter of recovery under subsection (1), liability as well as amount, and that it is for the Tribunal, therefore, not only to measure the amount paid in excess, but also to decide whether the Board have brought the case within subsection (1) and any further issue relevant to recovery, such as whether or not the claim or any part thereof is statute barred. If that is the true view, a decision of the Tribunal could well be a condition precedent to proceedings brought for the recovery of the sum alleged to be due.

Grammatically, the wording of section 22 would appear to be capable of supporting either construction, and in these circumstances it is permissible to look to the results which would be produced by each. Having done so, I cannot believe that the Legislature intended to confer upon the Tribunal the power to determine such issues as fraud, misrepresentation, non-disclosure and the effect of the relevant limiting enactments, for if so, the effect of subsections (2) and (3) of section 22 would be to take away from the courts the right to deal with these matters and to make the provisions for appeal from courts of summary jurisdiction to quarter sessions virtually ineffective. It seems to me that on its true construction what section 22 commits to the Tribunal is a question of quantum when it arises and not a question of liability. This meaning accords with the ordinary purport of the language used. Moreover, the words "If any question arises, "whether in or in connection with any legal proceedings or otherwise" seem to manifest an intention to provide for cases where a question of quantum has arisen in the course of proceedings taken without any prior reference to the Tribunal. In view of these considerations, and since Parliament has expressly given summary courts jurisdiction to deal with claims under section 22, I would hold that the Board's right of action did not depend on the decision of the Tribunal or its certification and, accordingly, that ruling (b) is in error.

I would, therefore, answer the question posed by rulings (a) and (b) in the negative. So far as the resident magistrate was concerned, ruling (c) was obviously meant to be consequential upon the previous rulings, and so read should fall with them. But I do not think it necessary to give a formal answer to the question posed by (c) and I shall refrain from doing so as such a course might lead to misunderstanding. There is no evidence to show how far, if at all, the claim of the Board was statute barred, and in these circumstances an accurate answer to this question becomes impossible.

The next matter for consideration is whether we should remit the case to the resident magistrate so that he may deal with it in the light of our decision. I do not think we should take this step. The Board brought their claim and sought to prove it on the strength of a certificate which was a hopelessly insufficient document for the purpose and quite incapable of founding a decree. The Board chose to rest on this certificate and took the view that it settled the matter and the rights of the parties. If the case were now sent back, the Board might feel at liberty to start afresh and proceed to proof in some other way. In the circumstances, I do not think this ought to be permitted.

I would accordingly allow the appeal and dismiss the summons.

BLACK L.J.: I agree, and do not wish to add anything, except to emphasize, in fairness to the Appeal Tribunal which issued the certificate in this case, that it would appear that all that the Tribunal purported to decide was the question of the amount of the excess payments to the defendant, and not any question whether that amount was recoverable under section 22 or not. The Tribunal might perhaps have amplified the certificate, by reference to the facts upon which its decision was based, and the documents which were before it, but it would appear from the certificate that the Tribunal confined itself to one task, that of ascertaining the amount.

CURRAN L.J.: I agree, and have nothing to add.

Appeal allowed.

Summons dismissed.

Solicitor for the Board: *Chief Crown Solicitor.*
Solicitors for the Defendant: *Collins & Collins*

J.P.

MAGHERAFELT RURAL DISTRICT COUNCIL v. NELSON[1]

Public Health—Housing—Whether dwelling-house unfit for human habitation Unfitness of part of dwelling-house—Planning and Housing Act (Northern Ireland), 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 29.

A rural district council made a demolition order in respect of a dwelling-house pursuant to section 29 of the Planning and Housing Act (Northern Ireland), 1931, and the owner of the house appealed to the county court.

The house, which was let to a tenant, comprised six rooms: four of these rooms on one side of the house were damp and defective with rotting woodwork and plaster; the remaining two rooms in which the tenant and his wife lived, were in reasonable condition.

On the hearing of the appeal the Recorder held that the defects in the unoccupied part of the house did not detract from the amenities of the remainder of the house, which, he found, were adequate for the needs of the tenant. He accordingly allowed the appeal and quashed the demolition order.

Held, by the Court of Appeal, (i) that while the Recorder had correctly directed his mind to the issue whether the unfitness of part of the house was such as to render the whole house unfit for human habitation, he had misdirected himself by applying the test of fitness to the portion of the house which was occupied, instead of to the house as a whole; (ii) that the facts of the case were such that the only conclusion which could reasonably be reached was that the house as a whole was unfit for human habitation (iii) that, accordingly, the decision of the Recorder should be reversed and the demolition order restored.

Drayson v. Galbraith [1955] N.I. 168 explained.

CASE STATED by the Recorder of Londonderry.

Magherafelt Rural District Council, being satisfied that a dwelling-house owned by the respondent was unfit for human habitation and was not capable at reasonable expense of being rendered so fit within the meaning of section 29 of the Planning and Housing Act (Northern Ireland), 1931, and having complied with the provisions of that section, made an order for the demolition of the dwelling-house. The owner appealed to the county court.

At the hearing, before the Recorder of Londonderry, the following facts were admitted or proved:

(i) The appellant was the owner of the premises, portion of which was occupied by a tenant and his wife and the remainder was unoccupied.

(ii) The premises comprised a six-roomed house, and four of such rooms were unoccupied. These were two sitting-rooms and a scullery

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran J.J. Jan. 20, Feb. 16, 1961.

on the ground floor, all on the one side of the entrance hall, and a bedroom on the upper floor immediately above such rooms.

(iii) The occupied portion of the house was all on the other side of the entrance hall. It consisted of (a) a large kitchen furnished and used as the main living-room and (b) a large airy bedroom immediately above. The stairs in the entrance hall commenced just outside the kitchen door and led directly to the occupied bedroom upstairs. There was no connection between this room and the unoccupied bedroom which had been completely sealed off by building up the former doorway.

(iv) There were no serious defects in the entrance hall or stairway and there was no dampness in either of the two occupied rooms. Nothing in this occupied side of the house was detrimental to the health of the occupants.

(v) The unoccupied side of the house had serious defects. Most of the rooms were damp and the gable wall and chimney stack on this side both showed fractures, and generally there was much evidence of disrepair and rotting of plaster and woodwork.

On this evidence, the Recorder found that the defects in the unoccupied side of the house did not detract from the amenities of the occupied portion which, he held, were adequate to the needs of the tenant. He accordingly found as a fact that the dwelling-house as an entity was not unfit for human habitation.

Rejecting the submission made on behalf of the Council that he was bound in the circumstances to hold that the dwelling-house as a whole was unfit for human habitation, the Recorder held that if the occupied portion of the premises was fit for human habitation, he was not obliged to hold that the dwelling-house as an entity was unfit; and further held that a dwelling-house might well be substantially defective in certain parts and yet when considered as a whole might not be unfit for human habitation within the meaning of section 29 or section 30 of the Act of 1931; he accordingly allowed the appeal and quashed the demolition order but on the application of the Council, stated this case for the opinion of the Court of Appeal as to whether he had been justified in coming to these decisions.

Higgins for the Council. The learned Recorder applied a test based on the needs of the tenant and his user of the premises, instead of asking the question whether the house as a whole was fit for human habitation, the test laid down in *Drayson v. Galbraith*[1]. That was a

[1] [1955] N.I. 168, 173.

section 30 case, but the judgments make it clear that the same reasoning is applicable to cases under section 29.

[LORD MACDERMOTT L.C.J.: If we were to decide that the learned Recorder had been wrong, what course could we adopt?]

I would submit that on the facts found, either expressly or by implication, the only conclusion which could reasonably be reached is that this house is unfit for human habitation. Four of its rooms would fail to comply with the first three of the standards of fitness referred to in section 33 of the Housing (Miscellaneous Provisions) and Rent Restriction Law (Amendment) Act (Northern Ireland), 1956, namely, repair, stability, and freedom from damp, and the case stated itself says these rooms have "serious defects".

[LORD MACDERMOTT L.C.J.: It seems clear that the learned Recorder was taking the house as a whole as his test, and the only question is whether he applied the test correctly. What the Council says is that if a larger family were to move into this house, the Council would be bound by the decision that the house is fit for habitation?]

Yes, that is so.

[LORD MACDERMOTT L.C.J.: Is there any provision for treating a part of a house as a separate entity for this purpose?]

Only section 32 of the Act of 1931, which deals with the case where part of a house is let as a separate dwelling. In this case the tenancy is in respect of the whole house, and the fact that the tenant makes use of only a part of it should not affect the determination as to whether the house is fit. The test to be applied is not whether a tenant could live in the house—see *Summers v. Salford Corporation*[1] per Lord Atkin—much less whether a tenant could live in a part of the house.

O'Donnell for the respondent. The case stated does not seem to raise any precise point of law, and the Council is seeking to roam at large over the facts of the case. The Council's argument in the court below would seem to suggest that the question was whether, if a substantial part of a house is unfit, the whole must be found to be unfit, but it is clear from *Drayson v. Galbraith*[2] that a house may be fit although part of it is unfit, and it would be unreasonable to ask this court to say that unfitness in a specific proportion or percentage of the house would necessarily render the whole of it unfit.

The learned Recorder applied the test laid down in *Drayson v. Galbraith*

[1943] A.C. 283. [2] [1955] N.I. 168.

[LORD MACDERMOTT L.C.J.: The distinction drawn between the occupied part of the house and the unoccupied part would seem to be an arbitrary distinction in view of the fact that the tenancy related to the whole house.]

Drayson v. Galbraith[1] makes it clear that the question whether a house is unfit for human habitation is one of fact and degree, and if the conclusion reached is one which could properly be reached, it is not for this court to say that the conclusion was wrong.

[LORD MACDERMOTT L.C.J.: But the learned Recorder applied a test based on the actual user of the premises.]

I would concede that a test based on actual user would not be the correct test, but it is not clear that that was the test applied. The Recorder considered carefully the decision of this court in *Drayson's* case[1].

[BLACK L.J.: Would you say that a house could be unfit as to two thirds, and yet be fit as a whole?]

Yes, it would appear from what Lord Dunedin said in *Hall v. Manchester Corporation*[2] that that might perhaps happen.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: In this case the learned Recorder of Londonderry had to deal with an appeal under section 34 of the Planning and Housing Act (Northern Ireland), 1931, by the owner of a dwelling-house situate at Grillagh, Maghera, against a demolition order made in respect of that house on June 14, 1960, by the appellant Council under section 29 of that Act. The basis of the demolition order was, as provided for by subsection (2) of section 29, that the Council were satisfied that the said dwelling-house was unfit for human habitation and not capable at a reasonable expense of being rendered so fit. No question arises as to the preliminary steps which have to be taken by a local authority under section 29 or as to whether the dwelling-house in question could have been rendered fit, at a reasonable expense, and the issue which the Recorder had to decide was simply whether the dwelling was unfit for human habitation within the meaning of the statute. He held that it was not unfit and allowed the appeal, but stated this case on the application of the Council as to whether, in point of law, he was justified in coming to that decision.

The case as stated is not a very satisfactory document for the

[1] [1955] N.I. 168.

[2] (1915) 84 L.J. Ch. 732, 738.

question of law is posed in vague terms and the findings of fact might well have been more precise and informative. There is, however, no doubt about certain material aspects of the matter and these I must now mention.

The house has six rooms. It has been let in its entirety to tenants, a Mr. and Mrs. John McShane, and they have been in occupation since March 1960. They only use two of the six rooms. These are both on the same side of the entrance hall and consist of a large kitchen extending from front to rere of the house on the ground floor and a large bedroom immediately above it. So far as one may judge from the terms of the case stated, there are no serious defects in these rooms or in the hall-way and stairs which give access to them and I shall assume, for the purposes of this appeal, but without expressing any conclusion on the point, that this used part of the dwelling-house is, in itself, not unfit for human habitation. The remainder of the house is not used by the tenants. This portion lies on the other side of the entrance hall and consists of two sitting-rooms and a scullery on the ground floor and, upstairs and immediately above these rooms, a bedroom. This unused part of the house has serious defects. In the words of the case: "Most of the rooms are damp and the gable wall "and chimney stack on this side both show fractures, and generally "there is much evidence of disrepair and rotting of plaster and "woodwork".

The learned Recorder had before him the decision of this court in *Drayson v. Galbraith*[1], and having considered the judgments in that case and in the English cases referred to therein, he seems to have accepted the view that, on the issue of fitness or unfitness for human habitation, he was bound to regard the dwelling-house as a whole and, further, that so regarded, a dwelling-house might be fit for human habitation although some part of it, when considered in isolation, was not so fit.

I see nothing amiss in these conclusions. The terms of the statute and the authorities referred to show clearly that the issue as to fitness must be directed to the dwelling-house as a whole, and that this issue is not necessarily determined by the fact that some part of the whole is, when taken by itself, unfit for human habitation.

The question then arises whether the learned Recorder duly applied these principles in reaching his conclusion. After a careful scrutiny of the case stated I am of opinion that he did not do so. It is, I think, clear that what he did was (i) to look to the actual, limited

[1] [1955] N.I. 168.

user by the tenants of the dwelling-house, (ii) to find that the part to which they had restricted their user was not unfit for human habitation, and (iii) to conclude that as the dwelling-house provided adequate accommodation for these particular tenants, it could properly be said that, as a whole, it was not unfit for human habitation. Thus, we find paragraph 6 of the case stated in these terms: "On the evidence I found that the defects in the unoccupied side of "the house do not detract from the amenities of the occupied portion, "which are adequate to the needs of the tenant. I accordingly found "as a fact that this dwelling-house as an entity is not unfit for human "habitation". And, again, in paragraph 7, after referring to the Council's submission that as a substantial part of the premises was defective he was bound to hold that the dwelling-house, as a whole, was unfit for human habitation, the learned Recorder adds this: "I, however, took the view that, if the occupied portion was fit for "human habitation, I was not in law obliged to hold that the dwelling-"house as an entity was unfit when on the facts I had found differ-"ently".

The underlying fallacy of that approach seems to me to lie in applying the tests of fitness primarily to a portion of the entity and not to the entity itself. The condition of the rooms used by the tenants was indeed relevant, but their decision to use and their user of only a part of the house were, in my opinion, quite irrelevant. They were under no obligation so to restrict their user and would have been entitled to extend their habitation throughout the whole house, of which they were the tenants, had they at any time desired to do so. Had the rooms which were, in fact, used by the tenants constituted a separate tenement the situation would have been different, and the fitness or otherwise of those rooms for human habitation might have been dealt with under section 32 of the Act of 1931. As the case stood, however, the relevant entity was the whole dwelling-house and nothing less. The issue for decision before the county court would have been the same if the tenants had not restricted their user as they did or if the house had been vacant at all material times. The question to which the learned Recorder should have directed himself was whether, the dwelling-house being looked upon as an entity and due consideration being given to the nature and extent of the defects in the accommodation contained therein, it could be said that the dwelling-house, as a whole, was unfit for human habitation having regard to the standard of fitness laid down in section 40 of the Act of 1931, as amended by section 33 of the Housing

(Miscellaneous Provisions) and Rent Restriction Law (Amendment) Act (Northern Ireland), 1956. That is quite a different process from the process followed by the learned Recorder who looked first to the condition of the part to which the tenants had restricted themselves and made that the basis of his ultimate finding. The "accordingly" in paragraph 6 and the "if" in paragraph 7 are eloquent as to that.

The next question is whether there should be a remit, or whether we have enough material before us to justify the substitution of a different decision. As I have remarked, the case stated might have been couched in more informative terms, but I have come to the conclusion that the facts and circumstances have been revealed sufficiently to compel the inference that the dwelling-house, considered as a whole, was unfit for human habitation. It is true, as I have already observed, that the fact that some part of a dwelling is, when considered in isolation, unfit does not necessarily mean that the dwelling-house, as a whole, is unfit for human habitation. In *Drayson v. Galbraith*[1], for example, this court contemplated that the defective condition of the flooring in one room of a house did not conclude the question whether the whole house was unfit for human habitation. In that case I said[2], after referring to *Summers v. Salford Corporation*[3]: "It no doubt shows that the unfitness of a part may "well mean the unfitness of the whole. But that is rather a question of "fact and degree to be determined according to the nature and cir-"cumstances of the particular case. Here, were the stairs or the floor "of the kitchen-living-room as rotten as the parlour floor it might "well be difficult to resist the conclusion that the house as a whole was "unfit for human habitation. But as matters stand it was, in my "opinion, open to the learned Recorder, as the judge of fact, to come "to a different determination". And Black L.J.[4] said this: "The "question is whether the dwelling-house is unfit. It may be unfit in "any one of a variety of different respects. Defective flooring in one "room may render a house unfit for human habitation or it may not. "The question is one of fact and of degree. If there was a defect in the "floor of a garret which could not conceivably be used either for "living in or for sleeping in this could hardly, I should think, be "legitimately regarded as rendering the house in any respect unfit for "human habitation, whereas a serious defect in the floor of the "kitchen of a kitchen house or a dangerously defective staircase could "scarcely leave any alternative but to regard the house as unfit".

1 [1955] N.I. 168.
2 Ibid. 174.
3 [1943] A.C. 283.
4 [1955] N.I. at 181.

In the present case it seems to me that no matter how much one may stress the point that the issue is a matter of fact and degree, the only proper conclusion open on the evidence is to hold that the Council were right in their decision that this dwelling-house was unfit for human habitation. We are not dealing here with a defective condition which is relatively restricted in its effect and is not such as to obtrude unduly upon the normal user of the whole house as a habitation. We are dealing with a case in which four out of the six rooms comprising what should be the habitable quarters of the dwelling—at least a half of the entire structure—are gravely defective, with most of the rooms damp, at least one outside wall broken, and much evidence or rotting plaster and woodwork. To find, in the face of this description, that the house, as a whole, is not unfit for human habitation would, in my opinion, be to disregard the relevant facts. It may well be that the learned Recorder was reluctant to see these particular tenants, whom he considered adequately housed in two rooms, put out of possession. I can appreciate that, but I can see no way of reaching the conclusion he did if the accepted principles are properly applied to the situation with which he was confronted.

I may add that if there is one person whom this conclusion should not surprise it is the owner himself. For, not once but twice, his solicitor, as appears from the exhibited correspondence, wrote to the Council that if they could get Mr. and Mrs. McShane suitably rehoused his client would be quite prepared to undertake not to use the house in future for human habitation.

For these reasons I would allow this appeal, answering the question submitted in the negative and confirming the demolition order made by the Council.

BLACK L.J.: I concur.

CURRAN L.J.: I also concur.

Appeal allowed.

Demolition order confirmed.

Solicitor for the Council: *D. S. Badger.*

Solicitor for the respondent: *K. M. Agnew.*

J.P.

LOMBANK, LTD. v. KENNEDY AND WHITELAW: LOMBANK, LTD. v. CROSSAN[1]

Contract Hire-purchase agreement—Penalty or liquidated damages—"Agreed depreciation" clause—Scope of penalty rule—Termination by owner as a result of failure of hirer to pay rentals contrasted with voluntary termination by hirer—Necessity for actionable breach of contract in order to attract penalty rule.

In each of two actions a hire-purchase company issued a specially indorsed writ claiming a sum for "agreed depreciation" of a motor car, which was the subject of a hire-purchase agreement. The relevant clauses of the agreements were identical in each case, and provided for the calculation of the "agreed "depreciation" being made by reference to a percentage of the total hire-purchase price. The percentage, not less than 45 per cent. and not more than 75 per cent., depended on the length of time the contract subsisted. In the first action the contract had been terminated by the company after the hirer's failure to pay the monthly hire rentals. In the second case the contract had been voluntarily terminated by the hirer. In each case the company applied to mark judgment in default of appearance but the applications were refused on the ground that the sum claimed on each writ was not a liquidated demand in respect of which judgment could be signed on default of appearance. An ex-parte application to the court for a direction that judgment should be entered was similarly refused, and the company appealed to the Court of Appeal.

Held, (i) that in each case the amount calculated under the "agreed "depreciation" clause was a penal sum rather than a genuine pre-estimate of damage;

(ii) (Black and Curran L.JJ., Lord MacDermott L.C.J. dissenting) that the penalty rule can only come into operation where there has been an actionable breach of contract, and that it did not, therefore, apply to the case where the contract was voluntarily terminated by the hirer.

Per Lord MacDermott L.C.J. The nature and purpose of the penalty rule do not necessarily call for more than a breach by way of non-performance by the promisor, be that non-performance actionable in itself or otherwise.

APPEALS from refusals of Sheil J. to direct that final judgment should be entered for the plaintiff company under the provisions of Order 13, rule 3, in two actions, in each of which no appearance had been entered by the defendant.

The following statement of facts is taken substantially from the judgment of the Lord Chief Justice.

In each of two actions the plaintiff, a London company, sought to recover money due under a contract of hire-purchase relating to a second-hand motor car. In the first, (hereinafter referred to as

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Sept. 15, 16, 1960; Jan. 19, 1961.

"Kennedy's case") the defendant Kennedy was sued as hirer of the vehicle in question, and the defendant Whitelaw was sued as guarantor. In the second (hereinafter referred to as "Crossan's case") the hirer was not sued and the action was brought against the defendant Crossan in his capacity as guarantor. The writs were both specially indorsed. In Kennedy's case the particulars given in the statement of claim made it clear that the amount sued for, namely, £340 3s. 0d. was claimed as "agreed depreciation" under clause 6 of the contract. In Crossan's case the claim was split under two heads: £43 6s. 8d. was alleged to be due for four months' arrears of the hire rental; and £181 1s. 4d. was alleged to be due, as in Kennedy's case, for "agreed depreciation" under an identical clause 6.

In each case the form of contract was the same, the only variations being those pertaining to the description of the hirer, the particulars of the vehicle and the sums to be paid in respect of it. The plaintiff company was throughout referred to as "the Owners" and the other contracting party, that is to say the party seeking to acquire the vehicle in question, as "the Hirer".

By clause 1 the owners agreed to let and the hirer agreed to hire the vehicle specified in the schedule to the contract on the terms and conditions therein referred to. By clause 2 the hirer entered into thirteen specific obligations. By subclause (a) he undertook to make an initial payment. By subclause (b) he undertook to pay punctually the monthly hire rentals set out in the schedule. In each case the monthly hire rentals were payable over a period of thirty six months, the date for the first payment and the amount of each ensuing monthly payment being clearly set out. By subclause (d) the hirer promised to keep the vehicle in good order, repair and condition and to replace all missing or unfit parts. And by subclause (f) the hirer was to be responsible for any damage to the vehicle however caused. Clause 3 (a) provided that the hirer might at any time terminate the hiring by giving notice in writing to the owners and by returning the vehicle in good order and condition, and clause 3 (b) stipulated that, if the hirer punctually paid the monthly hire rentals and all other sums due under the contract and strictly observed and performed his obligations thereunder, he was to have the option of purchasing the vehicle for the sum of twenty shillings. Clause 4 provided that the owners might terminate the hiring and retake possession of the vehicle if the hirer—(i) made default in the punctual payment of any sum due under the contract, or (ii) committed any breach of the contract, or (iii) did or allowed to be done anything which might prejudice or

jeopardise the owners' property or rights in the vehicle, or (iv) permitted any judgment against him to remain unsatisfied. Clause 5 provided for the termination of the contract and the hiring thereunder on the happening of any of certain events, namely, (i) the death of the hirer, (ii) the abandonment by the hirer of the vehicle, (iii) the taking of any step to levy a distress upon the vehicle or the premises where it is, (iv) the commission by the hirer of any act of bankruptcy, (v) the liquidation or winding up of the hirer, if a limited company, (vi) the taking of any step to levy execution upon the vehicle in the possession of the hirer, and (vii) the hirer agreeing to deliver or delivering the vehicle for repair to any person not first selected or approved in writing by the owners. Clause 6 related to the following events—the hirer returning the vehicle to the owners under clause 3 (a), the owners retaking possession of the vehicle under clause 4, or the termination of the contract under clause 5. In any of these events clause 6 stipulated that the hirer should pay to the owners: "(a) all "arrears of rent.... (b) the cost of all repairs and replacements "required to be done.... and (c) by way of agreed depreciation of "the goods a sum equal to.... if the goods be a motor vehicle, 45 per "cent of the total hire purchase price payable under this agreement "(including initial payment and hire charges).... plus.... a "further 5 per cent of such total hire purchase price for each month "which has elapsed between the date of the agreement and receipt of "the goods by the owners up to 75 per cent of the said total price "less.... the total of the sum already paid and the moneys due to "the owners for hire rentals at the date of the reciept of the goods by "them".

In Kennedy's case none of the instalments was paid and the hiring was terminated by the owners under clause 4 of the contract. No instalments were paid in Crossan's case either, but in his case the owners said that he voluntarily terminated the hiring in exercise of the powers conferred by clause 3 (a).

The defendants did not appear after the writs had been served and the owners applied for judgment in each case Order 13, rule 3, which provides that a plaintiff may enter final judgment in default of appearance "where the writ of summons is indorsed for a liquidated "demand, whether specially or otherwise". The officer dealing with the application refused to enter judgment in either case on the ground that the sum claimed by each writ was not a liquidated demand. The owners thereupon moved ex parte before Sheil J. for a direction that judgment should be entered under the rule mentioned. Sheil J.

refused this application in each case and the owners appealed from that ruling.

Brown Q.C. and *Lavery* for the appellant. The penalty rule does not apply in these cases because the agreed depreciation becomes due whether there is a breach of contract or not. The method of assessment is the same no matter what may be the circumstances in which the contract is terminated and, consequently, on the authority of the earlier English cases, no question arises as to whether the agreement provides for a penalty or liquidated damages.

In *Elsey & Co., Ltd. v. Hyde*[1] which was decided in 1926, Salter J. had to consider a contract very similar to those in the present cases and held that it did not come within the scope of the penalty rule. That decision was followed in *Chester & Cole, Ltd. v. Avon*[2] and approved in *Roadways Transport Development, Ltd. v. Browne & Gray*[3] and in *Chester & Cole, Ltd. v. Wright*[4]. The reasoning of Salter J. in *Elsey's* case[1] was quoted in *In re Apex Supply Co.*[5] where it was held that the question whether a sum to be paid as compensation was a penalty did not arise in circumstances where it was a sum to become payable in a certain event and not by way of damages for breach of contract. See also Wild on Hire Purchase, 1960 ed., p. 84.

The position was clear until 1952 when the majority of the court in *Cooden Engineering Co., Ltd. v. Stanford*[6] held that a similar agreed depreciation clause did come within the penalty rule. It is submitted that the case was wrongly decided on this point and that the dissenting judgment of Jenkins L.J. should be followed. He agreed with the rest of the court that the amount claimed was penal but emphasised the necessity to show that a case came within the penalty rule before any question can arise of distinguishing between a penalty and liquidated damages. It is submitted that the question whether the amounts in the present cases are penal cannot be reached, but it should be noted that in *Cooden's* case[6] the amount claimed was 100 per cent. of the total price, and that in *Landom Trust Ltd. v. Hurrell*[7] the depreciation was fixed at £125 irrespective of when the contract was terminated.

Even if the penalty rule can apply to a clause of this kind where there has been an actionable breach of contract, it cannot apply where

[1] (Unreported) See Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 107.
[2] (1929) op. cit., 155.
[3] (1927) Ibid. 118.
[4] (1930) Ibid. 124.
[5] [1942] Ch. 108.
[6] [1953] 1 Q.B. 86.
[7] [1955] 1 All E.R. 839.

the contract is terminated by the hirer under the terms of the agreement: *Associated Distributors, Ltd. v. Hall*[1].

The respondents did not appear and were not represented.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. stated the facts, set out the relevant clauses of the hire-purchase agreement, and continued: We have no memorandum from the officer who dealt with the application, but it is clear that the decision not to enter judgment was taken after a scrutiny of the special indorsements and of the contracts to which they referred, and was based on two conclusions—(1) that the stipulation in clause 6 for the payment of "agreed depreciation" was subject to the rule of law which distinguishes between penalties and liquidated damages; and (2) that, so regarded, this stipulation was in the nature of a penalty and could not therefore be considered as founding a liquidated demand which would make Order 13, rule 3 applicable.

Before going further it will be appropriate to say something about the scope and purpose of the rule of law to which I have just referred and which I shall speak of, for brevity, as the "penalty rule". Its precise origins are difficult to trace. It was a rule of equity and was regarded by Lord Thurlow, when Lord Chancellor, as well settled in 1783. That was in *Sloman v. Walter*[2], a case concerned with the penalty stated in a bond, in which Lord Thurlow said: "....the "only question was, whether this was to be considered as a penalty, "or as assessed damages. The rule, that where a penalty is inserted "merely to secure the enjoyment of a collateral object, the enjoyment "of the object is considered as the principal intent of the deed, and "the penalty only as accessional, and, therefore, only to secure the "damage really incurred, is too strongly established in equity to be "shaken".

In Story's Equity Jurisprudence, 10th ed. (1870) the learned author, in s. 1314, states the rule in terms which closely follow the language used by Lord Thurlow in *Sloman v. Walter*[2]. Then, in s. 1316 he says: "The true foundation of the relief in equity in all "these cases is, that, as the penalty is designed as a mere security, if "the party obtains his money, or his damages, he gets all that he "expected, and all that, in justice, he is entitled to". And later, in s. 1318, we find this passage: "But we are carefully to distinguish "between cases of penalties strictly so called, and cases of liquidated

[1] [1938] 2 K.B. 83.

[2] (1783) 1 Bro. C.C. 418.

"damages. The latter properly occur, when the parties have agreed "that, in case one party shall do a stipulated act, or omit to do it, the "other party shall receive a certain sum, as the just, appropriate and "conventional amount of the damages sustained by such act or "omission. In cases of this sort, courts of equity will not interfere to "grant relief; but will deem the parties entitled to fix their own "measure of damages; provided always that the damages do not "assume the character of gross extravagance, or of wanton and "unreasonable disproportion to the nature or extent of the injury. "But, on the other hand, courts of equity will not suffer their juris- "diction to be evaded merely by the fact, that the parties have called a "sum damages, which is, in fact and in intent, a penalty; or because "they have designedly used language and inserted provisions, which "are in their nature penal, and yet have endeavoured to cover up "their objects under other disguises".

A recent statement of the rule will be found in Cheshire and Fifoot on Contract, 5th ed. (1960) at pp. 512-3. In describing the distinction between liquidated damages and penalties, the learned authors say this of the latter class: "Secondly, it may be in the nature of a threat "held over the other party *in terrorem*—a security to the promisee "that the contract will be performed. A sum of this nature is called a "penalty, and it has long been subject to equitable jurisdiction. "Courts of Equity have taken the view that, since a penalty is "designed as mere security for the performance of the contract, the "promisee is sufficiently compensated by being indemnified for his "actual loss, and that he acts unconscionably if he demands a sum "which, though certainly fixed by agreement, may well be dis- "proportionate to the injury".

That I would respectfully adopt as a correct statement of the law in so far as it goes. But text-writers and the courts have had more to say on how to distinguish between penalties and liquidated damages than on the scope or ambit of the penalty rule itself, and it is the latter question—which for ease of reference I shall refer to as the preliminary question—that seems to me to present the main problem in these appeals. The final conclusion on this problem calls for a consideration of the authorities, but the broad purpose of the rule is, I think, sufficiently clear to depict, in general terms, the nature of the field to which it relates, even if it does not fix the bounds thereof with precision. Thus, it may be said that to attract the rule—(a) there must have been a failure on the part of the promisor to perform some one

or more of his contractual obligations; (b) the relevant stipulation, that is to say, the stipulation for payment of the sum alleged to be a penalty, must be referable to such non-performance, and (c) the relevant stipulation must also be of a nature capable of acting *in terrorem*, that is to say, of deterring the promisor from the relevant non-performance. A stipulation, for instance, that operated only on the occurrence of some event quite outside the control of the promisor would seem, at any rate at first blush, to lie beyond the scope of the penalty rule.

But this general description of the scope of the rule leaves a number of difficulties unnoticed. For example—must the promisor's non-performance be such as of itself to constitute an actionable breach of contract? And can the rule apply if the relevant stipulation purports to fix the sum which is to be paid, not only in the case of non-performance, but also on the happening of other events which do not amount to non-performance? As will appear, these and other aspects of the matter have been the subject of decision, though the difficulties involved are, unfortunately, reflected in the conflicting state of the authorities. Before coming to these, however, it will be convenient to say a little more about the facts in the cases before us.

In Kennedy's case the contract was made on March 10, 1959, in respect of the hire-purchase of a second-hand Hillman Minx Saloon which was valued or priced at the sum of £560. Kennedy made an initial payment of £119, leaving a balance of £441 due. The hire charges were agreed at £112 13s. 0d. and this sum, together with a purchase fee of £1, when added to the balance price, produced a figure of £554 13s. 0d. as the balance which Kennedy agreed to pay off in monthly hire rentals. The first rental payment was due on April 10, 1959. It and the thirty-four succeeding monthly rentals were fixed at £15 7s. 7d. and the final rental payment was to be £16 7s. 7d. Kennedy paid none of the instalments and the hiring was terminated by the owners on August 22, 1959, under clause 4 of the contract which became applicable on the hirer's default. The writ was issued on April 22, 1960, claiming £340 3s. 0d. under the contract. The particulars state that the "agreed depreciation" under clause 6 is £505 4s. 9d. being 75 per cent of the total hire-purchase price which is given as £673 13s. 0d. This latter figure is made up of the price of £560, plus the hire charges of £112 13s. 0d. plus the purchase fee of £1. Whether the purchase fee should be in this total I am not quite clear, but clause 6 (c) makes it plain that the expression "total hire-purchase "price", of which a percentage is to be taken, includes the initial

payment and the hire charges. Then, from the 75 per cent figure of £505 4s. 9d. is deducted the amount of the initial payment or deposit of £119. This leaves a balance of £386 4s. 9d. and the owners abandon £46 1s. 9d. of this (for reasons which are not explained in the statement of claim) and so arrive at the sum sued for. Kennedy's case is therefore one in which the hirer failed to perform his obligations to pay the hire rentals, as promised under clause 2, and in which the non-performance was a breach of contract directly connected with the termination of the contract and the demand for "agreed depreciation" under clause 6 (c).

Crossan's case is different and Mr. Brown, for the owners, submits that the difference is material. There, the hirer, one Arthur Jukes, was a serving soldier when the contract was made on March 24, 1959. He was posted away from this jurisdiction after this date and did not pay any of the monthly hire rentals. But in the month of July 1959, the owners say that he voluntarily determined the hiring in exercise of the powers conferred by clause 3 (a). In these circumstances, the owners, having regained possession of the vehicle, issued their writ on April 28, 1960, claiming, as already mentioned, four months' hire rental and £181 1s. 4d. for "agreed depreciation" under clause 6 (c), which clause, it will be remembered, applies in the event of the determination of the hiring by the hirer as well as by the owners, and also in the other events already listed. The contract in this case related to a second-hand Vauxhall Saloon, the price or value of which was given as £385. An initial payment of £85 was made, leaving a balance price of £300. This, plus a hire charge of £90 and a purchase fee of £1, produces the sum of £391 as the amount to be paid off by monthly instalments. The first of these was due on April 28, 1959, and amounted to £10 16s. 8d. Thirty-four other monthly payments of the like amount were then payable, followed by a last monthly payment of £11 16s. 8d. The particulars in the statement of claim relating to the item of £181 1s. 4d. are based on a retention of the vehicle for a period of four months, the gross amount of "agreed depreciation" being shown as £309 8s. 0d. or 65 per cent of the total hire-purchase price of £476 which, as in the last case, is made up by adding to the price or value of £385 the hire charges and purchase fee of £90 and £1 respectively. From the 65 per cent sum of £309 8s. 0d. is deducted the amount of the deposit, £85, and the four months' arrears of hire rentals as provided for by clause 6 (c), leaving £181 1s. 4d., the sum claimed under this head. While, as in Kennedy's case, the hirer failed to perform his obligations to pay the hire rentals as promised under

clause 2, it was he, and not the owners, who terminated the contract. For this reason it was said, on behalf of the owners, that there had been no breach by the hirer in respect of which a claim for damages would lie.

The next step must be to consider what I have called the preliminary question—to inquire whether either of these cases falls within the scope of the penalty rule. That takes me to the authorities, but before examining them I must observe that the further issue, namely, whether clause 6 (c) provides for liquidated damages or for a penal sum, is relevant to this preliminary question. It will be convenient to discuss this further issue later in this judgment, but because of its present relevance I will now state my conclusion thereon which is that clause 6 (c) provides for a penal sum and not for liquidated damages.

The first of the authorities to which I would refer on the preliminary question is the case of *Elsey & Co. Ltd. v. Hyde*[1] decided by a Divisional Court, consisting of Salter and Fraser JJ. There, the claim was to recover money under certain hire-purchase contracts in respect of tricycles. These contracts were in many ways similar to those now before us. The hirer having got into arrears with the instalments due, the owners terminated the hiring and then sued to recover, in addition to certain other amounts, the sum of £25 by way of compensation for depreciation. Despite the contention that the penalty rule applied and that this was a penalty and not liquidated damages, the court held that the sum sued for was recoverable. The leading judgment was that of Salter J., Fraser J. agreeing in general terms and also holding that the sum was not a penalty but a genuine pre-estimate of damage. The importance of the case, however, lies in the fact that Salter J. went further than this, and held, in effect, that the case was not within the scope of the penalty rule. Salter J. seems to base his conclusion on three grounds. He takes first the case of a hirer exercising the right (such as he has in these contracts) to terminate the hiring and says[2]: "Supposing the hirer exercises his "right to terminate this hiring, how can it be said that this sum of "money, which it is agreed shall be paid, is a penalty or that it is a "case in which either the agreed sum or liquidated damages must be "paid? If the hirer terminates this agreement, what right does that "give the owner to recover any damages against him? He has done "him no wrong, he has broken no contract, and I am quite unable to

[1] (1926) (Unreported) See Jones and Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 107.
[2] Op. cit. 112.

"see that this sum would or could give a penalty if it were claimable "in those circumstances". Salter J. then applies this view to the case he had to decide, saying[1]: "I think, therefore, as it is to my mind not a "penalty where it is payable on the return of the article by the hirer, "it ought not to be regarded as a penalty where it was payable on the "retaking of the article by the owner". Secondly, he takes the case where there is a determination by the owner, not because the hirer has made default, but because of the happening of an event which is not a breach of contract, the example given being the levying of execution against the hirer, an event, which in that case, as in the present contracts, would justify, according to the terms of the documents, the same demand against the hirer as the termination of the hiring by either hirer or owners. Of such an event Salter J. says[1]: "There is no wrong done by the hirer to the owner, and it is no breach "of any contract which the hirer has made with the owner. How "could that event give to the owner of the goods any right to recover "damages against the hirer, liquidated or unliquidated?" And applying that to the instance before him, the learned judge then adds[1]: "It appears to me that no question of penalty could arise in such a "case, and if this sum is not a penalty where it is payable on the "determination of the hiring by the owner, by reason of the levy of "execution, it seems to me it would be a strange result if it were to be "held a penalty where it is payable on the termination of the hiring "by the owner on the ground of non-payment of rent by the hirer".

The third ground is related directly to the case with which Salter J. was dealing, where the hiring was determined by the owner because the hirer was in arrear with his payments. Salter J. says of this[1]: "It is "proved that this is a breach of this contract, and it is proved that "that breach, apart from any termination of the hirer, would give the "owner a right to damages against the hirer. But what would those "damages be? They would be interest on the amount unpaid and "nothing more. The fact that the hirer is in arrear with his payment "will not entitle the owner to any damages for depreciation of these "things. The reason that they have suffered is that they have second-"hand goods put on their hands before they have received very much "money in respect of them. That is not the result of the hirer's "breach of contract, in being late in his payments, it is the result of "their own election to determine the hiring, and it appears to me, even "in this case, there is no question of penalty at all, and there is no

[1] Op. cit. 113.

"question whether the sum paid shall be regarded as liquidated "damages or a penalty".

That was in 1926. Three years later, in 1929, in *Chester & Cole, Ltd. v. Avon*[1], Hawke J. followed the case which I have just cited. Then, in 1930, a Divisional Court (Lord Hanworth M.R. and Greer L.J.) in *Chester & Cole, Ltd. v. Wright*[2] had to consider a claim under a hire-purchase contract, relating to a motor car, which had been brought against the administratrix of a deceased hirer. Both members of the court appear to have reached a decision by finding that the sum sued for was not a penalty but liquidated damages, having regard to the tests laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*[3]. To that extent the decision does not involve the preliminary question now under consideration, but while this is so, the views of Salter J. in *Elsey's* case[4] are certainly not questioned, and Greer L.J. says[5]: "....and it may very well be that the view which is, I think, the "view of Mr. Justice Salter in *Elsey's* case[4], which was cited before us, "is the right way to look at this clause, namely, that it is not either "liquidated damages or a penalty, but it is a sum payable in respect "of one event, namely, the determination and end of the hiring "agreement, whether that end of the hiring agreement arises from "the hirer delivering the car back again, or whether it arises from the "owner taking it out of the possession of the hirer in the events in "which he is entitled to take it out".

In *Associated Distributors Ltd. v. Hall*[6] the Court of Appeal (Slesser, Scott and Clauson L.JJ.) had to deal with a claim arising out of a hire-purchase contract relating to a tandem bicycle. By the terms of the contract the hirer was given the option of terminating the hiring at any time by returning the bicycle, but in the event of his doing so it was further agreed that the hirer should pay a certain sum by way of compensation for depreciation. The hirer having exercised this option after paying only one instalment, the owners claimed under the contract for arrears of rental and for depreciation. The county court judge held that this latter amount was a penalty. The Court of Appeal reversed this decision holding that no question as to liquidated damages or a penalty arose—in other words, that the case did not fall within the ambit of what I have called the penalty rule. Slesser L.J. stressed the option given to the hirer to terminate the

1 Op. cit. 124.
2 Op. cit. 115.
3 [1915] A.C. 79
4 (1926) op. cit. 107.
5 Ibid. 130.
6 [1938] 2 K.B. 83.

hiring and said[1] that it followed that "no question of penalty or "liquidated damage arises at all". His reasoning did not go further, and the other members of the court concurred. This decision, it should be noted, did not deal with the position arising where the contract is terminated, not by the hirer, but by the owners. That, as I read the judgments, was meant to be left open.

The next case to which I would refer is *In re Apex Supply Co., Ltd.*[2] a decision of Simonds J., as he then was. There, the contract was for the hire-purchase of certain articles of second-hand machinery. The hiring company agreed that if it should go into liquidation and the owner company should retake possession of the goods before the expiration of nine months from the date of the contract, the hiring company would pay a further sum which, together with the payments already made, should equal a stated figure "by way of compensation for the depreciation of the said "goods". The hiring company went into liquidation and the owner company retook possession of the goods within the nine month period. The owner company then claimed under the contract for the sum fixed for depreciation. In the circumstances Simonds J. held that the question whether the sum in dispute was a penalty or liquidated damages did not arise since it was a sum to become payable in a certain event, namely, the termination of the contract as thereby provided, and not by way of damages for breach. In the course of his judgment the learned judge referred to the judgment of Salter J. in *Elsey's* case[3] at considerable length, and he also quoted extensively from the judgment of Greer L.J. in *Chester & Cole, Ltd. v. Wright*[4]. He then came to the conclusion that he was bound to follow the reasoning of Salter J. in *Elsey's* case[3] and reached his conclusion accordingly. While he refrained from stating his own view on the point I cannot but think it would have been to the same effect. He had certainly no criticism to offer of the decision of the Divisional Court in *Elsey's* case[3].

Then, on this important preliminary question, we come to the decision of the Court of Appeal (Somervell, Jenkins and Hodson L.JJ.) in *Cooden Engineering Co. Ltd. v. Stanford*[5]. That case related to a contract of hire-purchase in respect of a motor car whereby the defendant agreed to hire the said motor car and to pay a hiring rental over a period of thirty months. The hirer could at any time return

[1] [1938] 2 K.B. at 88.
[2] [1942] Ch. 108.
[3] (1926) op. cit. 107.
[4] Ibid. 124.
[5] [1953] 1 Q.B. 86.

the car and determine the contract on payment of the instalments in arrear and a sum fixed in lieu of compensation for agreed depreciation. By another clause, clause 11, the owners were entitled to determine the hiring and retake possession should the hirer have made any incorrect statement, or suppressed any information in the proposal, or have failed to make the payments due under the contract, or have died. The hirer fell into arrears and the owners thereupon terminated the contract, retook possession and sued the hirer, as provided by clause 11, for the unpaid balance of the hiring instalments. The hirer contended that clause 11 constituted a penalty and that the sum was not recoverable. The court was unanimously of opinion that if the sum sued for could be regarded as a penalty — that is, if the preliminary question were to be decided in favour of the hirer—it was a penalty rather than liquidated damages. Jenkins L.J. took the view that the penalty rule did not apply, but the majority held otherwise and, accordingly, ruled that the sum claimed was a penalty and not recoverable.

This decision, in effect, reverses *Elsey's* case[1], and it will be helpful to note what was said on the main points of divergence. The opinion of Somervell L.J., on the reasoning which underlies the first two of the grounds that Salter J. relied upon, is thus expressed[2]: "But it cannot, "I think, follow as a matter of law that a sum exigible for a breach or "breaches cannot in law be a penalty because it is made payable in "the happening of some other event which is not a breach". Hodson L.J. deals with the same matter, and after stating the argument, says[3]: "I am unable to accept this contention, which seems to involve that a "draftsman of a written contract can always draw his document in "such a way as to defeat the common law by incorporating in the "same clause provisions dealing with the right to determine the "contract on the occurence of an infinite number of events only one "of which is a breach of contract".

On the other hand Jenkins L.J. founds his dissent on the view expressed in the following passage of his judgment[4]: "Supposing the "sum prescribed by clause 11 became payable upon a determination "by notice founded on the death of the hirer, or on an automatic "determination due to the presentation of a winding-up petition "against the hirer (being a company), no question, so far as I can see, "of the sum being a penalty in the relevant sense could arise, and "that being so it seems to me impossible to invest the same sum with

1 (1926) Op. cit. 107.
2 [1953] 1 Q.B. at 96.
3 Ibid. 116.
4 Ibid. 110.

"the character of a penalty where the determination by reason of "which it becomes payable happens to be brought about by notice "founded on or automatically by some breach of contract on the "part of the hirer".

Opinions may well differ on various aspects of the law of hire-purchase, but on this point I would respectfully adhere to the view of the majority in the Court of Appeal. I see no sound answer to the reasoning of Somervell and Hodson L.JJ. and I think it should prevail.

Somervell L.J. then deals with a further line of argument which is really that adopted by Salter J. in what I have described as his third ground. Somervell L.J. states this argument and answers it in the following passage of his judgment[1]: "It is that the law as to penalties "is inapplicable if the owner under the agreement is entitled to " 'determine' the agreement as the result of any breach. If in a "contract of this kind, without the special provisions of clause 11, "the hirer committed a breach going to the root of the contract, the "owner would be entitled to treat this as a repudiation, to retake "possession of the car, to be free from all further obligations to let "the hirer have possession of the car and to sue for damages: in other "words, to determine the contract and claim damages. The effect of "the words we are considering is, I think, to give the same rights in "the event of any failure to make punctual payment. The effect of this "clause is first to make punctual payment a condition of the contract, "and then to provide for the financial consequences to the hirer if the "owner treats that breach as a repudiation giving him the right to "free himself from all further obligations and claim money. No "objection can be taken to the former, but as it seems to me the law "as laid down in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and "Motor Co. Ltd.*[2] is applicable to the financial consequences, which "are plainly a sum to be paid in consequence of the breach".

On this point Hodson L.J. observes[3]: "My difficulty is to see the "validity of the distinction between a claim to receive payment of a "sum of money because of a right to determine arising from breach "of contract and a claim to receive payment of the same sum by "reason of breach of contract giving a right to determine. The latter "situation arises in cases of breach of condition amounting to a "repudiation of the contract giving the opposite party the right to

[1] [1953] 1 Q.B. at 96.
[2] [1915] A.C. 79.
[3] [1953] 1 Q.B. at 116.

"accept the repudiation and sue for damages. In so acting he deter-"mines the contract. Clause 11 purports to produce exactly this "situation in respect of any breach referred to therein, and it seems "to me unreal to speak of a remedy arising from the right to deter-"mine as opposed to a remedy arising from the breach". These views have my respectful concurrence. To hold otherwise would be to divorce the rule of equity from the realities of the situation and place it at the mercy of the form in which the contract is expressed.

I cannot distinguish, as respects the preliminary question, between the *Cooden* case[1] and Kennedy's case. On this issue the relevant considerations are similar and clause 6 (c) is certainly of a nature capable of acting *in terrorem* as respects non-performance. I would therefore hold that Kennedy's case comes within the ambit of the rule.

In Crossan's case the material distinction has already been noted. The hirer terminated the contract under clause 3 (a) after breach of his promise to pay the rental instalments punctually. This would appear to bring the case within the decision of the Court of Appeal in *Associated Distributors Ltd. v. Hall*[2], but, if so, it can only be distinguished from the *Cooden* case[1] on the merest technicality, for the only material difference is that in Crossan's case the hirer gave the terminating notice when the owners might equally well have done so. It is clear that the penalty rule, as a rule of equity, is not to be circumvented by drafting devices and it would be strange to the point of absurdity if, other considerations being the same, the rule protected the hirer when the owners terminated the contract by notice, but not when he did so himself. In the *Cooden* case[1] the majority looked beyond the formal termination by notice to the antecedent breach and I do not see why this should not also be done where it is a defaulting hirer who gives the notice. In either case there is the same non-performance and the same stipulation for payment of compensation. In my opinion, therefore, Crossan's case is also within the scope of the penalty rule.

The same conclusion may, I think, be supported by another related, but rather broader, line of reasoning. The penalty rule has often been spoken of as applying where there has been a breach of contract. See, for a recent example, *Tool Metal Co. v. Tungsten Electric Co.*[3], where Lord Simonds says: "No case was cited where "the doctrine was invoked otherwise than for a penalty payable on

[1953] 1 Q.B. 86.
[1938] 2 K.B. 83.
[3] [1955] 2 All E.R. 657, 662.

"the breach of a contractual obligation". The typical instance may be of such a breach when actionable per se; but, in my view, the nature and purpose of the rule do not necessarily call for more than a breach by way of non-performance by the promisor, be that non-performance actionable in itself or otherwise. The kind of stipulation struck at by the rule is one which seeks to enforce performance by a sanction out of proportion to the loss suffered by the promisee through non-performance. If the contract is so drawn as to make the non-performance not in itself an actionable breach the mischief which the rule seeks to control may not be any less. Take, for example, an instance that could arise under the form of contract with which we are dealing. The initial payment has been made and delivery of the vehicle has been taken by the hirer who then changes his mind about the hiring before the date on which the first instalment is due. Without waiting for that date the hirer terminates the contract under clause 3 (a) by giving notice and returning the vehicle. So far he has committed no actionable breach for, though he has turned his back on his promise to pay the instalments as provided by clause 2 (b), he has lawfully ended the hiring before any default in payment has occurred. If clause 6 (c), the relevant stipulation, is to be taken at its face value he is, nevertheless, liable—it may be within a few days of the contract—to pay 45 per cent of the vehicle's price plus 45 per cent of the hire charges, less the initial payment which the owners already have. It would be strange if this were so when he could have the protection of the rule (as I would hold) by making default in his payments before the contract was terminated. I do not, however, rest merely on the anomalous character of this situation. A provision which is aimed at keeping the hiring alive throughout the stipulated hire period seems to me as capable of coming within the purpose and spirit of the penalty rule when non-performance is not actionable in itself as when it is. In either case the essential question is surely the same—is the relevant stipulation calculated to *secure the performance* of the hiring? If it is, I do not see why another provision, such as we have here, which allows the hirer to end the hiring prematurely and brings the relevant stipulation into operation if he does so, should have the effect of ousting the rule or of abating the mischief it is designed to meet. To hold otherwise would be to entertain a device for keeping the rule at bay while purporting to confer a privilege on the promisor. The facts in the *Tool Metal Co.* case[1] were not concerned with any kind of non-performance; they have nothing in

[1] [1955] 2 All E.R. 657.

common with the position under discussion, and the decision of the House of Lords does not, in my opinion, run contrary to the view I have just expressed. Lord Simonds, it is true, associates the penalty rule clearly with a breach of contractual obligation, but the question whether such breach must always be actionable per se did not arise and was not decided. In the case of an actionable breach, the promisee may recover his actual loss as damages even though the penalty rule prevents his recovery of the sum agreed upon as the amount of compensation payable. It has been suggested that if the rule were applied to a case of non-actionable breach—as, for example, where a hirer, having promised to pay the hire instalments throughout the hire period, exercises a right to terminate the hiring prematurely—the promisee could recover neither his actual loss nor the agreed amount, and that this would be at variance with equitable principles. I do not see why such a distinction should have to be made in the application of an equitable doctrine. In the case of the breach or non-performance which is actionable what equity says to the parties is, in effect this—"You have agreed that a measured sum "for compensation will be payable. That is really a penalty to secure "performance and will not be enforced. But notwithstanding what "you have agreed, the loss actually suffered will, as a matter of "fairness, be recoverable instead". There seems to be no good reason why equity should not speak in the same terms where the non-performance is not actionable, and all the more so where the difference between what is actionable and what is not depends on a provision which does not really affect the equities of the situation. To judge from the reports, the courts do not seem to have been called upon to apply the penalty rule to non-actionable breaches. But, while that may be so, equitable principles which aim at the promotion of fair dealing have a way of outlasting the particular forms of conduct that begot them, and the question here, as I see it, is not one of extending the principles of the rule but of applying them to a modern form of contract dealing with a modern form of transaction. There is certainly no ground for thinking that the march of events has outmoded the rule, particularly in these days when the desires and needs of the individual so often put him at the mercy of documents devised to suit the interests of some powerful corporation.

For the reasons stated I would hold that the rule is not ousted by these contracts and that both Kennedy's case and Crossan's are within its scope. Like Somervell L.J. in the *Cooden* case[1], I express

[1] [1953] 1 Q.B. 86, 98.

no opinion as to the applicability of the rule, or some analogous equity, to cases within clause 6 (c) which, like death or liquidation, are outside the control of the hirer.

The next question is whether clause 6 (c) provides for liquidated damages or a penal sum. Depreciation is a difficult form of loss to measure in advance and I see no reason why it should not be the subject of a genuine pre-estimate of loss which would be liquidated damages and recoverable on a liquidated demand. On this branch of the case, however, Sheil J., following the decision of Denning L.J. in *Landom Trust, Ltd. v. Hurrell*[1], held that this was a penalty clause and refused the application accordingly. Applying the tests laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co. Ltd.*[2], I am of opinion that this conclusion was right. I do not think it can be said that clause 6 (c) operates with anything like uniform severity, for it would seem that its capacity to act *in terrorem* gets less as the hiring continues and more instalments are paid. But it is clear from the *Dunlop* case[2] that the crucial date in this connection is the date of the contract and not a later date. So regarded, the provision for depreciation at the rate of 45 per cent "of the total hire-purchase price", if the hiring is determined within a month, seems to me like anything but a genuine pre-estimate of loss under this head in the event of the vehicle being returned within that period. Whether the goods were second-hand or new, this percentage is in marked contrast with the subsequent monthly increase of 5 per cent and seems far more than might reasonably be expected as the loss in value in such a short time. This view becomes all the stronger when it is observed—(i) that the 45 per cent is taken not only on the agreed value at the date of the contract but on a figure which includes that and the hire charges as well, and (ii) that the hirer is also chargeable with the cost of all necessary repairs and replacements. To my mind this "agreed depreciation" for the first month is plainly *in terrorem* and a penal sum. If that is so the whole of clause 6 (c) is penal and it is unnecessary to go further.

For these reasons I conclude that the demand was not a liquidated demand in either of the cases before us, and I would, therefore, dismiss the appeals.

The sum of £43 6s. 8d. claimed in Crossan's case as arrears of hire rental, is a liquidated demand and there is no suggestion that the

[1] [1955] 1 All E.R. 839. [2] [1915] A.C. 79.

penalty rule applies to it. I have not dealt with it, however, as the owners sought to have judgment entered for the entire sum claimed and we have not been asked for any special direction as respects this particular item.

BLACK L.J. stated the facts and continued: It appears that in the first of the cases before us (the case relating to the Hillman car) the defendant Kennedy fell behind in his payments and the plaintiffs retook possession of the car in exercise of their rights under clause 4 of the agreement whereas in the second of the cases (the case relating to the Vauxhall car) the hirer Jukes, though in arrear in his payment of the hire rentals, exercised his right under clause 3 of the agreement and voluntarily terminated the hiring.

The problem for the court in these cases seems to fall naturally under two heads: first, whether the plaintiffs are entitled as of right to have the payments agreed to be made for "agreed depreciation" under clause 6 (c) treated as liquidated damages or whether on the other hand they are of the type which equity will scrutinize and relieve against as not being liquidated damages but penalties; and second, if the payments are held to be of this type, whether they are so excessive in the present case that they should be regarded as penal.

It may be convenient to consider the second of these questions first.

As stated in the third of Lord Dunedin's propositions in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*[1], the question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.

I would emphasize the words "the terms and inherent circum- "stances of each particular contract". What will be a reasonable pre-estimate of the depreciation of a motor car, kept and maintained in good order, repair and condition in accordance with the provisions of clause 2 of the plaintiff's printed form of agreement will in any individual case depend on a number of factors: the make of the car; the type of the car, whether it is new or second-hand; if second-hand, its age and the mileage it has done; and for aught I know, various other considerations which a dealer in motor cars would take into account. In order to make a genuine pre-estimate of probable depreciation the circumstances of the particular vehicle must be

[1] [1915] A.C. 79, 86-87.

taken into consideration. I appreciate that in contracts of this nature hire-purchase companies may desire to have a clause providing for a pre-estimate of depreciation if the motor car or other chattel is thrown back on their hands. But it seems to me ex facie a weakness of clause 6 (c) is that the agreement is obviously designed to apply to motor cars of all makes and types and whether new or old (and indeed from the wording of clause 6 (c) to other goods as well) and that exactly the same rigid calculation is applied to determine the depreciation of every individual car whatever its age, condition or quality.

I do not propose to encumber this judgment with figures and calculations, but if we address ourselves to the particular cases of the two agreements which are sued upon in these actions and judge clause 6 (c) as at the time of the making of the contracts in accordance with the principle enunciated by Lord Dunedin, it will readily appear that in certain circumstances at any rate it would be impossible to regard the amount calculated under clause 6 (c) as a genuine pre-estimate of damage. This will appear to be especially the case if the plaintiffs retake the car by reason of a breach of contract in the early days of the hiring. In such an event clause 6 (c) would provide for the payment by the hirer on foot of depreciation of an amount which, save perhaps in some very exceptional cases, would be totally disproportionate to the actual depreciation and much in excess of what could possibly be recovered by the plaintiffs in the absence of clause 6 (c) in an action for damages for breach of contract. Accordingly, I would hold that in each of the two cases before the court the amounts provided for by clause 6 (c) are penal sums and are such that in actions at the suit of the plaintiffs claiming to recover them as liquidated damages for breach of contract, the court should hold that they were not genuine liquidated but arbitrary amounts fixed *in terrorem* with the object of deterring the hirers from breaking their contracts, and were in fact penalties against which the courts in actions claiming to recover them on foot of breaches of contract would grant relief.

Having come to the conclusion that the sums calculated in accordance with clause 6 (c) are penal sums I turn to consider the effect of this finding in the present cases.

In Kennedy's case, the case of the Hillman car, the hirer by falling behind in his payments was guilty of a breach of contract and the plaintiffs retook the car in reliance on clause 4 of the agreement. If

the plaintiffs can establish that they sustained damages arising from the hirer's breach of contract, e.g. by having thrown back on their hands a car depreciated in value, they can sue the hirer and his guarantor for these damages, but it has now been decided by the English Court of Appeal in *Cooden Engineering Co., Ltd. v. Stanford*[1], a decision followed and welcomed by Denning L.J. in *Landom Trust, Ltd. v. Hurrell*[2], that the rule of equity regarding relief against penalties applies to clauses in hire-purchase agreements such as clause 6 (c) in the agreements now before us. I would express my respectful agreement with the judgments of Somervell L.J. and Hodson L.J. in the former case and with that of Denning L.J. in the latter case, and I would accordingly hold that in the case of the Hillman car the plaintiffs were not entitled to recover under clause 6 (c) a liquidated sum by way of depreciation of the car against the hirer or his guarantor and accordingly were not entitled to mark judgment on foot of the specially indorsed writ which they issued.

I have dealt with the position in this first case on the point of principle, but I think it is right to notice that in any event the indorsement on the writ must be wrong. According to the indorsement the basis of the calculation of the "agreed depreciation" under clause 6 is 75 per cent of the total hire-purchase price This 75 per cent could not be arrived at under clause 6 (c) until six months had elapsed since the commencement of the hiring; and according to the terms of the clause at least six months' hire rentals (whether paid or unpaid) amounting at least to over £92 would then fall to be deducted from this 75 per cent. No such deduction is made in computing the amount alleged to be due in the indorsement of the writ.

Crossan's case, the case relating to the Vauxhall car, appears to me to stand on a different footing from the first. Though the hirer in this second case was in arrear in payment of the rentals it appears that the plaintiffs did not exercise their right to retake the car under the provisions of clause 4 of the agreement, but that the defendant voluntarily terminated the hiring as he was entitled to do under clause 3 (a) of the agreement. If this is so, the plaintiffs could not claim to be compensated on foot of breach of contract for the depreciation of the car so thrown back on their hands, for the car did not come back to them by reason of any breach of contract on the part of the hirer, but by reason of the exercise by the hirer of the option to terminate the hiring conferred on him by clause 3 (a) of the agreement. Accordingly in such case the plaintiffs could not recover

[1] [1953] 1 Q.B. 86. [2] [1955] 1 All E.R. 839.

compensation for the depreciation of the car in an action for breach of contract; they could only recover such compensation if it was provided for by some specific provision in the hiring agreement. Such a provision in the present case is clause 6 (c) of the agreement. Where the hirer voluntarily terminates the hiring in exercise of the right conferred on him by clause 3 (a) of the agreement and the car is returned to the plaintiffs, the amount expressed to be payable to the plaintiffs under clause 6 (c) does not represent damages for the breach of any contract. It is not an amount payable on foot of any default on the part of a hirer. It is an amount agreed to be paid by the hirer upon the exercise by him of the privilege of termination the hiring conferred by clause 3 (a).

There is high authority for the proposition that the only cases in which the doctrine that equity relieves against penalties applies are cases where the penalty is imposed for breach of a contractual obligation. In *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*[1] the appellant company entered into an agreement with the respondent company licensing the latter in consideration of a royalty of 10 per cent to deal in certain hard metal alloys (called "contract material") produced under patents owned by the appellant company. By clause 5 of the agreement it was provided that if in any month during the continuance of the licence the aggregate quantity of contract material sold or used by the respondent company should exceed a quota of fifty kilograms, it should pay to the appellant company compensation equal to 30 per cent of the net value of the excess contract material. This compensation provision turned out to be a very burdensome one for the respondent company, especially after the outbreak of the war when production of the contract material greatly increased. Somewhat complicated litigation ensued between the parties which was ultimately carried to the House of Lords. One of the contentions raised by the respondent company was that the compensation provision contained in clause 5 was a penalty provision against which equity would grant relief. This contention was rejected successively by Pearson J.[2], the Court of Appeal in a judgment of Romer L.J.[3] (with whom Somervell L.J. and Birkett L.J. concurred) and by the House of Lords, all on the ground that the penalties against which relief will be granted according to the equitable doctrine are penalties designed as a punishment or a deterrent against a breach of contract, and that a production in

[1] [1955] 2 All E.R. 657.
[2] [1954] R.P.C. 13.
[3] [1955] 2 All E.R. at 686.

excess of the fifty kilogram quota was not a breach of contract. In delivering his opinion in the House of Lords, Viscount Simonds says[3]: "The plea that the provisions of the deed are unenforceable "because they impose a penalty clearly cannot be maintained. It is, "perhaps, enough to say that they do not impose, or purport to "impose, a penalty. No doubt the consequences of certain actions by "TECO may be detrimental to them, but that does not involve that "a penalty is imposed in the sense in which that word is used in the "equitable doctrine that equity relieves against penalties. No case "was cited where the doctrine was invoked otherwise than for a "penalty payable on the breach of a contractual obligation".

The case to which I have just referred was not, of course, a case arising out of a hire-purchase agreement, nevertheless what was said by Pearson J., Romer L.J. and Viscount Simonds was expressed sufficiently widely to cover the present case relating to the Vauxhall car. Moreover, the precise point arose for decision upon a hire-purchase agreement in the English Court of Appeal in *Associated Distributors, Ltd. v. Hall*[1]. In that case the agreement was for the hire-purchase of a bicycle. Under clause 5 of the agreement the hirer could at any time terminate the hiring by returning the bicycle to the plaintiffs, and clause 6 entitled the plaintiffs to determine the hiring and resume possession of the bicycle if the hirer committed any breach of any terms or conditions of the agreement. Clause 7 provided that in the event of the hiring being determined for any cause whatsoever the hirer would pay the plaintiffs by way of compensation for depreciation such sums as with the amount previously paid for rent would make up a sum equivalent to not less than one-half of the total amount payable under the agreement. The hirer terminated the hiring under clause 5 and the plaintiffs sued for arrears of rent plus the sum due under clause 7. The county court judge held that the sum claimed under clause 7 was a penalty and therefore irrecoverable. The Court of Appeal, reversing the county court judge's decision, held that as it was the hirer who had terminated the hiring no question as to the plaintiffs' claim under clause 7 being liquidated damages or in the nature of a penalty arose, and that the hirer was bound to pay the sum for which he had made himself liable under clause 7. Slesser L.J., after referring to certain previous decisions only reported in a text-book, continues[2] "....it is not "necessary in the present instance for us to express any opinion upon "those decisions, because they have nothing to do with the particular

[1] [1938] 2 K.B. 83. [2] Ibid. 87.

"case which we are here to determine, for here the hirer, not the "owner, terminated the hiring. He has exercised an option and the "terms on which he may exercise the option are those set out in "clause 7. The question therefore whether these payments constitute "liquidated damages or a penalty in the instances mentioned does "not arise in the present case". Scott L.J. and Clauson L.J. agreed.

Even if we had not had the assistance of what was said in the *Tool Metal Manufacturing Company's* case[1], I would be of opinion that even if we thought the matter doubtful we ought to follow the decision of the English Court of Appeal in this case of *Associated Distributors, Ltd. v. Hall*[2] on the ground stated by Holmes L.J. in a passage in *McCartan v. Belfast Harbour Commissioners*[3], which has been quoted with approval more than once in this court, that uniformity of decision is so desirable that it is better to accept the authority of the English Court and leave error, if there be error, to be corrected by the tribunal whose judgment is the same on both sides of the Channel.

In the result, I would hold in Kennedy's case (the case of the Hillman car) that the officials were justified in refusing to enter judgment, but that in Crossan's case (the case of the Vauxhall) the plaintiffs were entitled to have judgment upon filing the necessary affidavits.

I fully appreciate that it may appear to the ordinary layman not only anomalous but unjust if, while on the one hand the law will relieve a defaulting hirer against the payment of the penal sum stipulated for by clause 6 (c) when the finance company retake the car, yet on the other hand it will not give any such relief to a hirer who, without being guilty of any breach whatever of his agreement, decides to determine the hiring and return the car under the provisions of clause 3 (a), but will in this case leave the finance company to extract from such a man the full toll of the sum fixed by clause 6 (c). This, however, is the legal position as I understand it. And if this view is correct, the anomaly and any injustice which it may involve can, I fear, only be corrected—if it is thought that they ought to be corrected—by the Legislature.

CURRAN L.J.: Each of these two actions was brought by the plaintiffs on a specially indorsed writ. Neither defendant entered an appearance and thereupon the plaintiffs applied to the proper officer

[1] [1955] 2 All E.R. 657.
[2] [1938] 2 K.B. 83.
[3] [1910] 2 I.R. 470, 494.

to enter final judgment in each case by reason of such default. The officer refused to enter final judgment, on the ground that the claim, in each case, was for a penalty and not for a liquidated demand. The question for determination is whether the officer was right.

The terms of the hire-purchase agreements, so far as they are relevant to the issue, are identical. In each case the amount in question is described as a sum "by way of agreed depreciation of the "goods". It is a well known fact that motor cars do depreciate in value, and it is reasonable to assume that when a car which is the subject of a hire-purchase agreement is returned to, or is repossessed by, the owners its value will be less than its true value at the time the hire-purchase agreement was made. The rate of depreciation, or its extent at any particular time, would be difficult to pre-estimate. At the time, however, when the car is returned to or repossessed by the owners its then value can be assessed with reasonable accuracy and the resultant loss to the owners ascertained. Of course there is nothing to prevent the parties agreeing upon a pre-estimate of depreciation. But the fact that a reasonably accurate assessment can be made when the car comes back into the possession of the owners is, in my view, a factor to be taken into account when considering whether the purported pre-estimate of depreciation is genuine or whether it is in reality a penalty.

In each of the present cases the purported pre-estimate of depreciation is 45 per cent plus 5 per cent per month of the total hire-purchase price, (including initial payment and hire charges) with a limit of 75 per cent and a reduction in respect of the total paid by the hirer and the monies due to the owners for hire rentals up to the time the cars are returned to or repossessed by the owners. If the price of the cars as stated in the agreements is to be taken as their true value the hire charge appears to be a strange element to introduce in pre-estimating depreciation. It would be otherwise if the true value of each car is the total amount the hirer has to pay, but this cannot be so. Each car is being purchased at the price stipulated (including the final nominal purchase fee) and the facilities provided by the owners are paid for by the hire charge. There is, therefore, an element introduced which has nothing to do with depreciation and which tends to point to the purported pre-estimate of depreciation being a penalty rather than liquidated damages. The purported pre-estimate of 75 per cent provides for such total depreciation taking place in six months from the date of the contract. That is only one-sixth of the total period of the hiring. This rapid rate of depreciation is heavily weighted at the outset by the figure of 45 per cent. plus 5 per

cent immediately on the hirer signing the agreement. I cannot believe that the owners were pre-estimating such a sudden depreciation, and when I find that the hirer is, in addition, liable to maintain the car in good condition, I am satisfied that the purported pre-estimate of depreciation is nothing of the sort, but that it is *in terrorem*, that it is, in other words, a penalty, and not liquidated damages.

I accordingly agree that in the case of Lombank Ltd. v. Kennedy and Whitelaw the officer was right in refusing to enter final judgment for the plaintiffs on the ground that the claim is not a liquidated demand.

As to the case of Lombank Ltd. v. Crossan, if the contract was duly terminated by the hirer under clause 3 (a) of the agreement and if the hirer duly returned the car to the owners, the owners in my opinion, cannot claim in respect of the purported agreed amount for depreciation on any other basis. They could only claim such amount in respect of the hirer's default in paying hire rentals if they retook possession of the car under clause 4 (i) of the agreement. I find paragraphs 3 and 4 of the statement of claim somewhat vague. They are as follows: "3. The Hirer defaulted in the payment of the hire "rentals and voluntarily terminated the hiring on the 28th July 1959, "and the vehicle came into possession of the Plaintiff on the 20th "August, 1959. 4. Under clause 6 of the aforesaid agreement, it was "provided that in this event then the plaintiff would be entitled to the "following....". Paragraph 4 then goes on to quote clause 6 (a) which refers to arrears of rent and 6 (c) which refers to the depreciation of the vehicle.

When the words "in this event" are used in paragraph 4 of the statement of claim it is not clear what the event is to which it refers. It must I think refer to some event recited in paragraph 3, but in that paragraph there appear to be three events—the hirer's default in paying hire rentals, the voluntary termination of the hiring by the hirer on July 28, 1959, and, thirdly, the vehicle coming into possession of the plaintiff on August 20, 1959. As possession can only be retaken by the owners after they have terminated the hiring, and as paragraph 3 of the statement of claim does not allege a termination of the hiring by the owners, I am of opinion that the paragraph must be read as meaning that the hirer voluntarily terminated the hiring and returned the car to the owners.

In these circumstances the plaintiffs, in my opinion, can only claim for depreciation on the basis that the hirer has duly terminated the hiring and duly returned the car.

This raises the point that, inasmuch as the claim in respect of depreciation arises from the due termination of the hiring, and the due return of the car by the hirer, it does not arise from any breach of contract by the hirer. Accordingly, it is contended, the question of penalty does not arise.

There is strong support for this contention in *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*[1] where Lord Simonds says: ".... but that does not involve that a penalty is "imposed in the sense in which that word is used in the equitable "doctrine that equity relieves against penalties. No case was cited "where the doctrine was invoked otherwise than for a penalty payable "on the breach of a contractual obligation". Lord Cohen[2] agrees with what Romer L.J. had said in the Court of Appeal. The relevant portion of the judgment of Romer L.J. is appended to the report of the case in the House of Lords. In that judgment he says[3]: "For my "part, I cannot see any remote resemblance between these sums, "which became payable in pursuance of TECO'S contractual "obligations, and sums which are only payable on a breach of con-"tractual obligations".

In my opinion it is important to observe that, in applying the doctrine, equity has never intervened to deprive the plaintiff of a remedy; he could always recover what he was justly entitled to by way of damages for breach of contract. In the present case, if my foregoing opinion is right, if it be declared that the amount in question is irrecoverable on the ground that it is a penalty, the plaintiff would have no remedy for any loss due to depreciation, although it was clearly the intention of the parties to the hiring that the hirer should be liable therefor.

If the defendant, who is sued as the hirer's guarantor, has to pay an unreasonable sum for depreciation, he has the hirer to blame and, no doubt, has a remedy against him.

I would hold that the officer was wrong in refusing to enter final judgment in the action Lombank Ltd. v. Crossan.

Lombank v. Kennedy & Whitelaw: *Appeal dismissed.*

Lombank v. Crossan: *Appeal allowed.*

Solicitors for the appellant: *T. H. Cairns & Co.*

S.M.M.

[1] [1955] 2 All E.R. 657, 662.
[2] Ibid. 686.
[3] Ibid. 688.

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actionable breach of contract, and that it did not, therefore, apply to the case where the contract was voluntarily terminated by the hirer. Per Lord MacDermott L.C.J. The nature and purpose of the penalty rule do not necessarily call for more than a breach by way of non-performance by the promisor, be that non-performance actionable in itself or otherwise. *Lombank, Ltd. v. Kennedy and Whitelaw: Lombank, Ltd. v. Crossan.* [C.A. 192

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NATIONAL ASSISTANCE—*Money wrongfully obtained by misrepresentations —Question of amount referred to Appeal Tribunal—Certificate of Tribunal—Sufficiency of certificate to prove cause of action—Summary proceedings for recovery of amount—Accrual of cause of action—Whether time runs from date of certificate—National Assistance Act (Northern Ireland)*, 1948 (*c.* 13), *ss.* 22, 27—*Finance (Miscellaneous Provisions) Act (Northern Ireland)*, 1955 (*c.* 19), *s.* 25. By section 22 of the National Assistance Act (Northern Ireland), 1948: "(1) If, "whether fraudulently or otherwise, any "person misrepresents or fails to disclose "any material fact, and in consequence "of the misrepresentation or failure— "(a) the Board incur any expenditure "under this Act; or (b) any sum recover- "able under this Act by the Board is not "recovered; the Board shall be entitled "to recover the amount thereof from the "said person. (2) If any question arises, "whether in or in connection with any "legal proceedings or otherwise, as to "the amount which the Board are "entitled in any case to recover under the "last preceding sub-section, the question "shall be referred to the Appeal Tribunal. "(3) On any reference under the last "preceding sub-section a certificate "signed by the clerk of the Appeal "Tribunal setting forth the decision of "the Tribunal upon the question referred "shall be conclusive evidence of the "amount recoverable under subsection "(1) of this section". *Held*, by the Court of Appeal, (i) that section 22 of the Act of 1948 does not make mandatory a reference to the Appeal Tribunal under subsection (2) except where there is a question at issue as to the amount recoverable, and on such reference the Tribunal has no power to determine any issue other than that of quantum: accordingly a certificate given on such a reference is not prima facie evidence of liability; (ii) that the Board's right of action to recover sums due under subsection (1) does not depend on the decision of the Appeal Tribunal or its certification, and accordingly the issue of a certificate by the Tribunal is not a condition precedent to the bringing of proceedings under subsection (1). The National Assistance Board by summons dated September 30, 1959, sought to recover from the defendant as a civil debt a sum alleged to have been obtained by means of misrepresentations between July 1951 and August 1958. The Board had referred to the Appeal Tribunal under section 22(2) of the Act of 1948 the question of the amount which the Board were entitled to recover, and the Tribunal had certified on September 3, 1959, that the amount of excess payments was £835 14s. 6d. On hearing of the summons the certificate of the Tribunal was the only evidence submitted on behalf of the Board. The defendant, conceding that the limitation period applicable was six years, contended that because the summons alleged excess payments over a period going back more than six years from the date of the summons and the Board had not shown what excess payments were within the period of limitation, the whole claim was statute barred. For the Board it was contended that no cause of action arose until the issue of the certificate by the Appeal Tribunal. The resident magistrate ruled that the production of the certificate from the Appeal Tribunal was prima facie evidence that the defendant had wrongfully obtained the sums claimed by misrepresentations; that the right to recover such payments did not accrue until the issue of the certificate on September 3, 1959; and that the Board's claim was not statute barred. *Held*, by the Court of Appeal, (i) that the production of the certificate did not prove that the amount sued for had been wrongfully obtained by means of misrepresentation; (ii) that the accrual of any right of action which the Board might have was independent of the issue of the certificate; (iii) that as the Board had chosen to prove their claim by relying solely on a document which was completely insufficient to prove their claim it was not a proper course to remit the case, but the appeal should be allowed and the summons dismissed. *National Assistance Board v. McEneaney* [C.A. 176

NEGLIGENCE—*Building contractor—Dwelling-house erected by contractor for*

landlord—Defect in floor causing injury to first tenant—Duty of contractor to take reasonable care for the safety of persons lawfully using the house—House inspected and passed by the landlord's architect on completion—Effect of inspection on contractor's duty to take care. A dwelling-house was erected by the defendants, a firm of building contractors, for the Northern Ireland Housing Trust and on completion was inspected and passed by the Trust's architect. The plaintiff's husband was the first tenant of the house and he and the plaintiff went into occupation six days after the house had been inspected and passed. Eighteen months later when the plaintiff was walking over the wooden floor in one of the rooms wearing ordinary high-heeled shoes she fell and was injured by reason of the heel of her shoe having gone through the floor. Examination showed that a hole in a floor board had been repaired by the insertion of a plug of wood shaped to fit the hole and this plug had given way under the plaintiff's heel. In an action for negligence by the plaintiff against defendants, expert evidence was led by the plaintiff to show that the method adopted to repair the hole was not a proper method, and that in any event the plug had not been fitted in a workmanlike manner. At the conclusion of the case for the plaintiff the trial judge withdrew the case from the jury and gave judgment for the defendants on the ground that the defendants owed no duty in tort to the plaintiff. *Held*, by the Court of Appeal, reversing the decision of the trial judge; (i) that there was sufficient evidence to go to the jury that the hole had been made and plugged, or at any rate plugged, by the defendants; (ii) that the defendants owed a duty to the plaintiff, as a lawful user of the house they had constructed, to take reasonable care in the repair of the hole; (iii) that, on the evidence, although the defendants and their workmen could have anticipated the examination of the house which did in fact take place, they could not reasonably have anticipated that such inspection would expose the danger, and that accordingly there was no sufficient "reasonable possibility of inter-"mediate examination" to absolve the defendants from their duty to take care. *Donoghue v. Stevenson* [1932] A.C. 562 applied. *Gallagher v. N. McDowell, Ltd.* [C.A. 26

NORTHERN IRELAND—CONSTITUTIONAL LAW—*Validity of statute—Statutory prohibition on persons who cannot satisfy certain conditions continuing to act as bookmakers—Loss of goodwill of bookmaking business—"Take any "property without compensation"—Compensation provided by later statute—Transactions between bookmaker and English firm—Whether "trade with any "place outside Northern Ireland"—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 4(1) (7), 5(1)—*Betting and Lotteries Act* (*Northern Ireland*), 1957 (*c.* 19), *ss.* 5(1), 6(4)—*Finance* (No. 2) *Act* (*Northern Ireland*), 1957 (*c.* 24). *s.* 4(1). By section 4(1) (7) of the Government of Ireland Act, 1920, the Parliament of Northern Ireland has no power to make laws in respect of trade with any place out of Northern Ireland, and by section 5(1) of the same Act it is prohibited from making a law so as either directly or indirectly to take any property without compensation. The Betting and Lotteries Act (Northern Ireland), 1957, which was passed on July 29, 1957, legalised cash betting in Northern Ireland provided that bookmakers satisfied certain conditions. Section 1 requires every bookmaker to obtain a bookmaker's licence, and section 5(1) prohibits a licensed bookmaker from carrying on business as a bookmaker in any premises unless he holds a bookmaking office licence. Section 6, which came into operation on January 29, 1959, provides that a person who wishes to obtain a bookmaking office licence shall apply to a court of summary jurisdiction for a certificate of suitability, and by subsection (4) of that section a certificate of suitability shall not be granted in respect of any premises unless the applicant for such a certificate or his predecessor in title was on or before July 1, 1952, carrying on business as a bookmaker on those premises or on other premises from which such business had been transferred to those premises, or was on or before June 1, 1957, carrying on business on those premises exclusively as a credit bookmaker. The Finance (No. 2) Act (Northern Ireland), 1957, came into operation on December 12, 1957, and by section 4 of that Act it was provided "(1) Where a person "satisfies a county court—(a) that he "was, before the coming into operation "of section five of the Betting and "Lotteries Act (Northern Ireland), 1957, "lawfully carrying on a bookmaking

"business; and (b) that he is unable, by "virtue of the operation of subsection (4) "of section six of that Act, to carry on "that business; the Ministry of Home "Affairs shall.... pay to that person "compensation.... in respect of the "business lawfully carried on before the "coming into operation of the said "section five. (2) This section shall be "deemed always to have formed part of "the Betting and Lotteries Act (Northern "Ireland), 1957, and to have come into "operation on the passing of that Act". The plaintiff, a bookmaker whose business consisted mainly of cash betting and who had not been carrying on business on his premises on or before July 1, 1952, brought action against the defendant seeking a declaration that section 6(4) of the Act of 1957 was invalid. The claim was based on two grounds: (a) that having regard to the relevant dates and the nature of his business the plaintiff was unable to bring himself within the requirements of section 6(4) and thus was precluded from carrying on his business in his present premises, and that accordingly the section had the effect, either directly or indirectly, of taking property belonging to him without compensation; (b) that as the plaintiff engaged in transactions with a company in England for the purpose of his business as bookmaker by way of buying information relating to horse racing and by way of laying off bets, the Act, in so far as it would preclude him from carrying on his business and engaging in these transactions with a company in England was "a law in "respect of trade with any place outside "Northern Ireland". *Held*, by the Court of Appeal (i) that the Betting and Lotteries Act (Northern Ireland), 1957, and in particular section 6(4) thereof, was not confiscatory in nature but was a truly regulatory provision and that accordingly there was no taking of property; (ii) that assuming there had been a taking of property and it were necessary to provide compensation for the loss of a lawful credit bookmaking business which was segregable from an unlawful cash bookmaking business, such compensation was provided by the Finance (No. 2) Act (Northern Ireland), 1957, and it was irrelevant that this latter Act was passed subsequent to the earlier Act but before its relevant provisions came into force. (iii) that on the evidence it appeared that the transactions alleged to constitute "trade with any place outside Northern "Ireland" in fact took place in Northern Ireland between the plaintiff and the Belfast office of the English company, but even if the transactions had constituted "trade with any place outside "Northern Ireland" the effect of the legislation in question on such trade was merely incidental. *Gallagher v. Lynn* [1937] A.C. 803 applied. On further appeal to the House of Lords[1] *held*, affirming the decision of the Court of appeal in Northern Ireland, that section 4 of the Finance (No. 2) Act (Northern Ireland), 1957, was effective to provide compensation for a lawful bookmaking business and that, consequently, it was unnecessary to consider whether "pro- "perty" had been "taken" within the meaning of section 5 of the Act of 1920. Per Lord Radcliffe. A law is "made" within the meaning of section 5 of the Act of 1920 when its relevant provisions can be invoked as a source of legal authority, as distinct from the moment when the words of a law qualify to be enrolled upon the statute book *McCann v. Att.-Gen. for Northern Ireland.* [C.A. and H.L., 102

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PUBLIC HEALTH HOUSING—*Whether dwelling-house unfit for human habitation—Unfitness of part of dwelling-house—Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 29. A rural district council made a demolition order in respect of a dwelling-house pursuant to section 29 of the Planning and Housing Act (Northern Ireland), 1931, and the owner of the house appealed to the county court. The house, which was let to a tenant, comprised six rooms: four of these rooms on one side of the house were damp and defective with rotting woodwork and plaster; the remaining two rooms in which the tenant and his wife lived, were in reasonable condition. On the hearing of the appeal the Recorder held that the defects in the unoccupied part of the house did not detract from the amenities of the remainder of the house, which, he found, were adequate for the needs of the tenant. He accordingly allowed the appeal and quashed the demolition order. *Held*, by the Court of Appeal, (i) that while the Recorder had correctly

directed his mind to the issue whether the unfitness of part of the house was such as to render the whole house unfit for human habitation, he had misdirected himself by applying the test of fitness to the portion of the house which was occupied, instead of to the house as a whole; (ii) that the facts of the case were such that the only conclusion which could reasonably be reached was that the house as a whole was unfit for human habitation; (iii) that, accordingly, the decision of the Recorder should be reversed and the demolition order restored. *Drayson v. Galbraith* [1955] N.I. 168 explained. *Magherafelt U.D.C. v. Nelson.* [C.A. 184

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WILL—EXECUTION—*Requirements for an assisted signature—Whether the sufficiency of an assisted signature depends upon an implied direction—Distinction between an assisted signature and a signature made by another on testator's direction—Whether acknowledgment of a directed signature necessary when direction is given and signature made in presence of witnesses—Wills Act,* 1837 (7 *Wm.* 4 & 1 *Vict. c.* 26), *s.* 9. In a probate suit to establish a will it was alleged (inter alia) that the will had not been executed in accordance with section 9 of the Wills Act, 1837. The medical evidence at the trial showed that the testator was in an advanced condition of disseminated sclerosis which made movement very difficult, if not impossible The attesting witnesses, a solicitor and a solicitor's clerk, gave evidence of the manner in which the will was executed. One stated that "the will was signed by his mark in "our presence", and described how the pen had been placed in the testator's fingers. The other said: "I took the will "and the pen and I backed the pen "against his fingers and I made the "mark". Neither was cross-examined about the procedure followed when the will was executed, and the judge told the jury in his summing-up that if they accepted the evidence of the attesting witnesses they were entitled to find that

the will had been duly executed. The jury were not told that it was for them to decide whether or not the testator had made any physical contribution in the act of signing, nor was the distinction between an assisted signature and a signature by direction explained to them. On appeal to the Court of Appeal *held* by the whole court, (i) that the sufficiency of an assisted signature by a testator does not rest upon an implied direction; provided that there is some positive physical contribution on the part of the testator which is sufficient to indicate an intention to execute his will personally, the resulting signature, though assisted, will be his own signature and no direction to sign need be proved; (ii) that where a will is signed by some person other than the testator and the attesting witnesses are present both when the testator gives his direction to sign and when the signature is made, it is not then necessary for the testator to acknowledge the signature; (iii) that the mere passive conduct of the testator in connection with the signing of the will, while not amounting to a personal signature, may be sufficient to prove an implied direction to another person to sign on the testator's behalf. *Held*, further, by Lord MacDermott L.C.J. and Black L.J., Curran L.J. dissenting on this point, that though there was in the present case some evidence upon which the jury, if properly instructed, could have found in favour of due execution by means of a personal assisted signature, they had been misdirected inasmuch as (a) they had not been informed of nor instructed on the distinction between an assisted signature and a signature by direction, and (b) the judge had over-emphasised the importance of the maxim "omnia rate acta esse "praesumuntur"; and that accordingly a new trial should be ordered limited to the issue of due execution. *Fulton v. Kee.*
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